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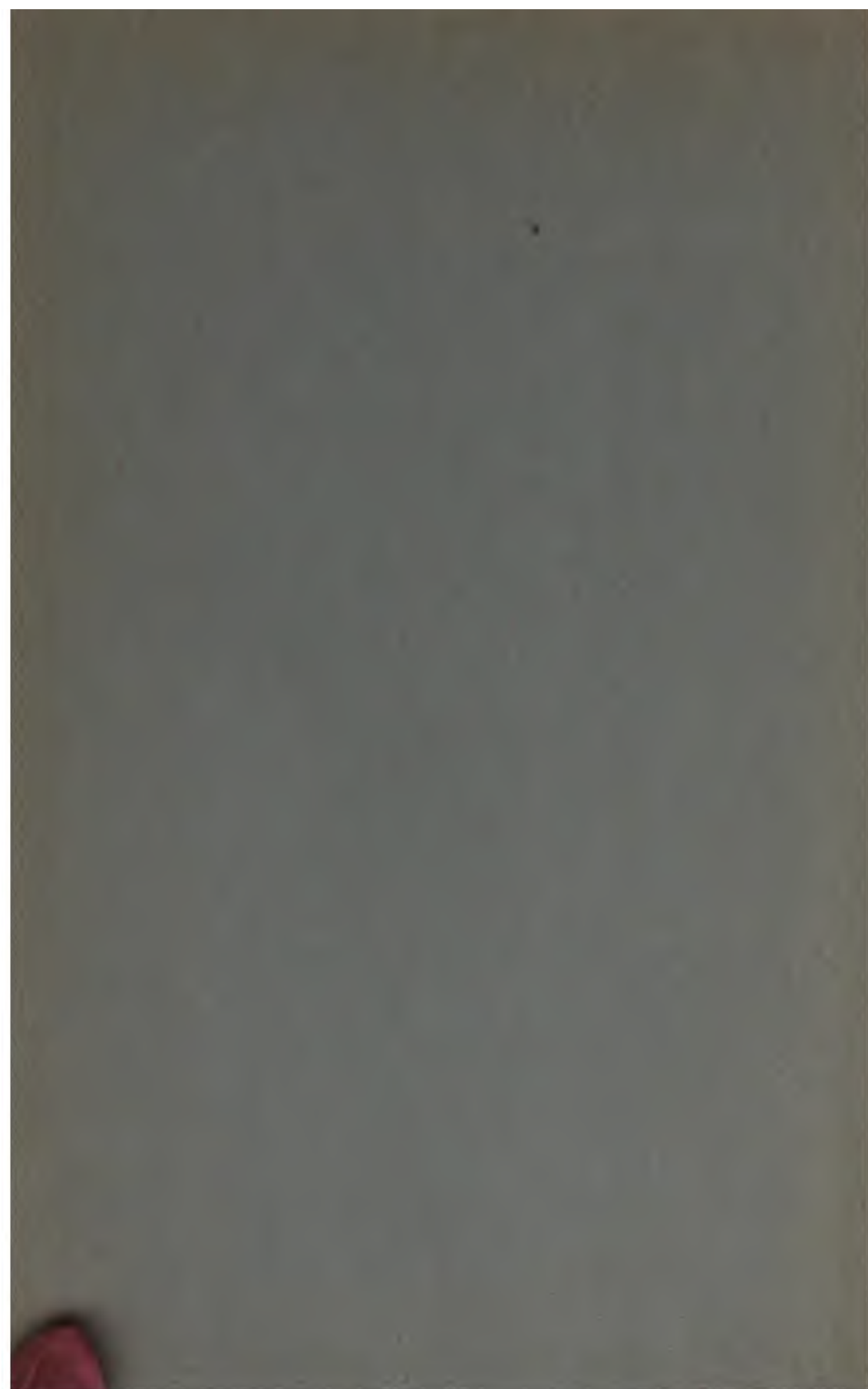
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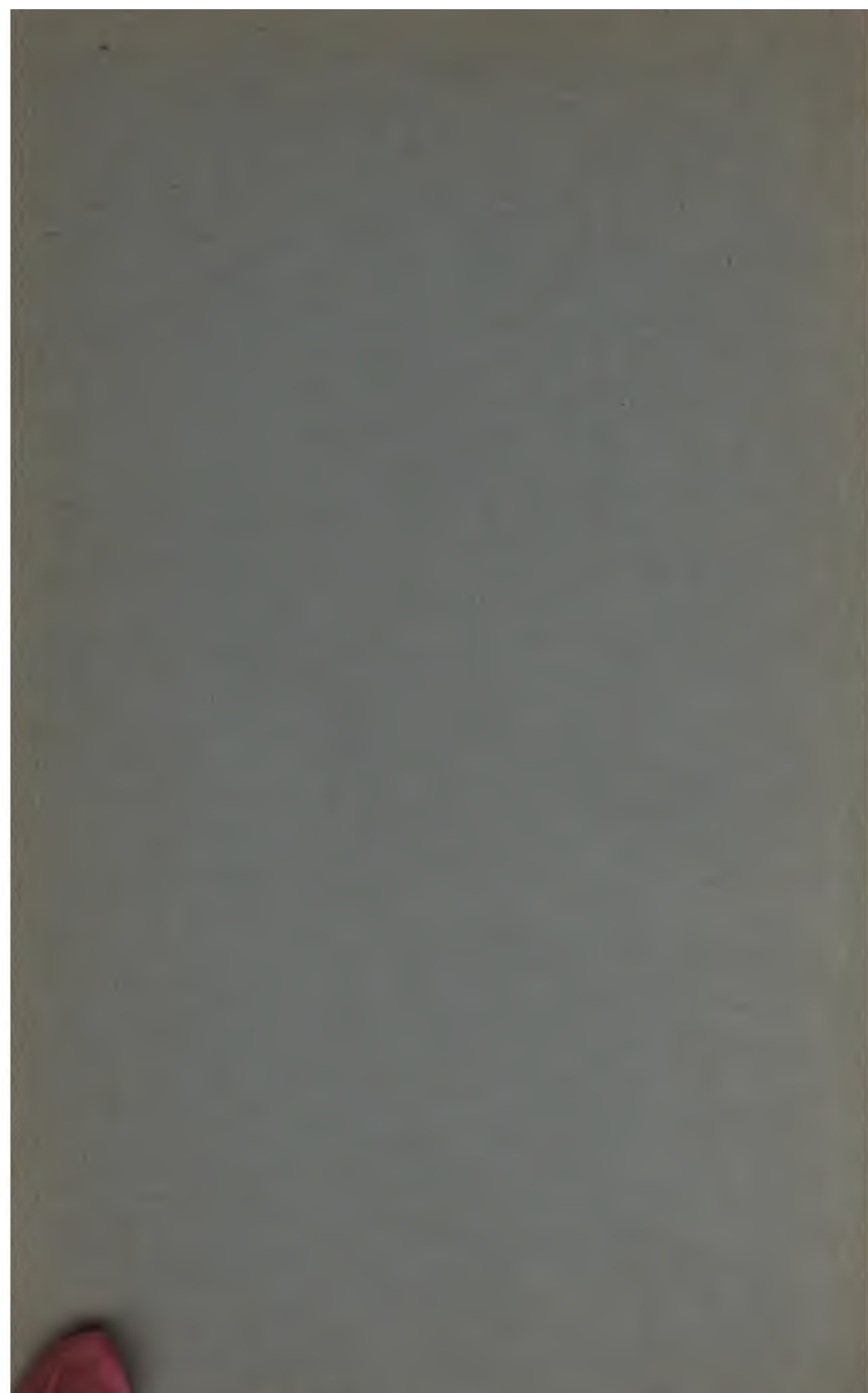


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INTERNATIONAL ADMINISTRATIVE LAW AND NATIONAL SOVEREIGNTY

The conception of a law common to the entire civilized world has received a new content and a practical interpretation through the recent development of international unions. The numerous private unions and associations for international purposes constitute a spontaneous grouping of men throughout the world who are interested in certain lines of enterprise — industrial, political, or scientific — which are not limited by national boundaries, but have the whole world for their field of action. The number of such associations already created is indeed surprising. Nearly every type of social effort for the promotion of the broader interests of mankind has been organized in this manner, so that there are literally hundreds¹ of international unions and associations. These bodies hold periodical conferences for the interchange of opinions and the comparison of results, and in many cases they have established permanent bureaus or offices.

The *public unions* which have been formed by the action of states, and which are now operating as public agencies of international interests, indicate the extent to which the national authorities have come to realize the importance of interests and activities that transcend in their operations the boundaries of the national state. There are over thirty of such unions, most of them endowed with permanent organs of administration, which enable them to fulfill, even though only in a rudimentary way, the three classic functions of government — the legislative, executive, and judicial. The interests which they represent and administer can be understood only when we consider the human world as a totality of interrelated forces and activities. From this point of view any other organization that might be given them would be defective in point of extent and efficiency.

¹ The number of international congresses held in the year 1906 was at least one hundred and sixty. See lists in the *Annuaire de la vie internationale*, 1906.

When any social or economic interest has assumed the character of a world-wide relation, when its activities in order to succeed must rest on the experience of all mankind, and must extend their operations over numerous national territories, then such an interest can be effectively regulated only upon a world-wide basis. The legal aspects of its organization and action can be expressed only in the terms of a law enacted from the point of view of international relations, rather than resting upon the experience and policy of any national state. The world law which is thus created is not merely an intellectual product such as the natural law of the older jurisprudence. Quite the contrary, it is the legal expression of positive interests and activities that have already developed in the life of the world, that are expressing themselves in action, and are therefore entitled to have their relations expressed also in juristic form. A law of this kind, while aiming at universality, will strive to avoid purely theoretical construction and will aim to base itself upon ascertained needs and actual experience.

When the principal interests that have already received an international organization are passed in review, it is not difficult to recognize in them those characteristics which make them essentially international. It is an often-repeated saying that the world at the present time stands in the sign of communication. The ideal of the civilized world with respect to economic relations is that the entire surface of the globe should be rendered readily accessible to the enterprise of all the world, and that rapid and uninterrupted communication should make possible a uniform management and control of the natural resources which humanity has inherited. The demands thus made upon international policies have their material support in the great advances recently achieved in the practical sciences and arts of communication. But in order that the greatest advantage may be gained by mankind from these inventions, a liberal character should be imparted to legislation. We need a uniform law of transportation by land and sea in order that the efficiency of communication may not be impaired by unnecessary local differences of regulation. Scientific jurisprudence has directed itself to the task of gradually unifying the principles of maritime law and restoring its character of a

world law, so that it may again be universal as it was in its original medieval form. The European Railway Freight Union has created an international code of transportation which must be considered one of the most notable achievements of modern international activity in the field of legislation. The very nature of communication makes it an international interest and establishes the unavoidable necessity of legislating in this matter from the point of view of universalism — regarding the world as a unified economic organization.

The same principles apply to correspondence by letter and telegrams. Rapidity of intelligence and notification is essential to the success of the efficient exploitation and control of the manifold natural resources of the earth and of its greater industrial and commercial enterprises. The impossibility of treating any of these interests from the point of view of a national policy alone was illustrated in a most striking fashion in the case of radiotelegraphy. When this process had gained recognition as a practical method, the British Marconi Company secured an exclusive contract with the British Lloyd and with the Italian Government for telegraphic service between vessels and the coast. Under this arrangement the wireless stations in these two countries would refuse to receive or send messages of any other system than that of Marconi. The political advantages of such an arrangement to a power like Great Britain are apparent at first sight; but this attempt at establishing a universal monopoly in so important an interest aroused the opposition of other states, especially of Germany, and it was attacked in the name of the general freedom of communication among nations. The two powers which favored restriction could not resist the logic of the opposition, so that finally in 1906 an agreement came into being which guaranteed for the future the international freedom of wireless communication.

Other interests which have been organized on an international basis, while not so clearly international in their nature, nevertheless contain prominent elements which have led to insistent demands for a universal organization. The scientific and positive interests connected with labor have long been organized on an international basis, and the problems of labor legislation can be dealt with satisfactorily

only from an international point of view. There are several elements in the labor situation of the world which render such a policy necessary. In order adequately to protect its own labor elements, any nation would be obliged to enact legislation which might seriously handicap its national industries unless assurance were given that foreign competitors should be bound by the same obligations. Efficient protection of national labor is therefore scarcely possible through the isolated efforts of an individual state. It must rest upon a basis of international understanding. Moreover, labor itself is an international force. Scarcely any nation at the present time provides from its own population all the labor forces of which it is in need. More or less permanent migrations of laborers from country to country take place at all times. The supply of labor therefore is international in scope and calls for international control.

Among all the prime economic interests that of agriculture appears at first sight to be entirely local and national. Yet, a less superficial consideration of the interests involved will show that agriculture is by no means an activity that can be fully protected upon a national basis. International protection is demanded against the importation of plant and animal diseases. In order that agricultural operations may effectively be adjusted to atmospheric and climatic conditions, the meteorological service ought to be organized upon an international basis. Accurately to determine the status of the market for agricultural products, world-wide determinations of the conditions of supply and demand are necessary; and agricultural labor, in fully as great a measure as that employed in the industries, is dominated by international conditions and population movements.

In scientific and administrative processes, it is the common experience of the entire world which is required in order that the most satisfactory results may be obtained. But it is especially in the field of criminal and sanitary administration that a large measure of international cooperation is necessary in order that national property and population may be protected. Modern criminal administration looks upon punishment as the lesser among its various tasks and concentrates its efforts upon the means of preventing crime. Hence, extradition by no means fulfills all the requirements of international

action. Crime is organized internationally; the prevention of crime must therefore be effected in a similar way. We need only think of the most fundamental crime against state existence, the plottings of revolutionary anarchism, to realize fully how important international cooperation will be to the future efficiency of the protective service. Thus, we may review all the interests of civilized humanity, intellectual or material, and we shall doubtless find in each of them certain elements which call for international action and organization. It is only when full advantage is drawn from the possibilities of international cooperation that such interests can in the future unfold and grow to their proper importance.

The body of law which is thus being created by the action of the authoritative organs of public international unions, and by cooperation among governments, is distinguished from general international law in that it not merely regulates the relations between national states, but undertakes to establish positive norms for universal action. We may tentatively apply to it the designation of international administrative law, defining it as that body of laws and regulations created by the action of international conferences or commissions which regulates the relations and activities of national and international agencies with respect to those material and intellectual interests which have received an authoritative universal organization. The law thus created contains principles and rules that might be viewed as the beginning of a universal civil law. This is true especially with respect to rules created in the matter of communication, such as the principle that telegrams and letters *must* be carried, but even these principles refer to administrative action, so that they may be embraced in the designation which we have used above. Should the efforts to unify the maritime law of the world be crowned with success, the body of law thus created would not properly be included under the above designation; it would be important enough by itself to be dealt with under its traditional name as a branch of the universal law of communication. In its elaboration and enforcement, however, international administrative organs would take an essential part.

The general purposes that are being achieved by the creation of an

international administrative law may be looked at from three different points of view. It is desired, in the first place, that a mutuality of advantages be secured for the citizens of all civilized states. In a portion of international legislative administration, the object therefore is not so much to change the national law as to secure for the subjects of one state the advantages of legislative and administrative arrangements in others. The national law with respect to patents, copyrights, or the admission to liberal professions may continue to differ in the various jurisdictions. The object of international arrangements would be to secure for the foreigner the advantage of the national law as it stands, so that he would be placed in the same position of right with respect to these matters as are the subjects of the state in question.

A second general object is the regulation of the administrative activities with respect to these world-wide interests on a basis adequate to their extent and importance. Such regulation may create an entirely new law, which the various national administrations bind themselves to respect, or it may involve the modification to a certain extent of national methods of procedure.

Finally, there is the ideal of uniformity or universality of law, which will be to a certain extent pursued in all these international unions. This ideal, on account of the simplicity and equity of the relations which it involves, is not merely attractive from the intellectual point of view, but, in a measure as it is achieved in any field, it clearly serves to free business intercourse and action from all kinds of difficulties and obstructions. It must, however, be noted in connection with this idea that it will be far easier to introduce uniform principles into the field of pure administrative activities than to establish a similar homogeneity in principles which have become part of the civil law. International administration has the advantage of operating largely in a field that has not been occupied as yet by systematized methods and historic traditions, such as is the case in the field of private law. Private international law, dealing with conditions and characteristics based on a long national experience, has far greater obstacles to overcome in its unifying efforts than has international administrative law.

As the purposes thus outlined are achieved more and more, great advantages are to be gained. Homogeneous development, uniformity, and simplicity are favored. Commercial and industrial intercourse is facilitated by the absence of irrational local differences in legal rules. Unfair competition is prevented by the uniformity of national regulations, which places competition the world over upon a higher plane, and which checks the granting of entirely unfair advantages to national enterprises and industries. The disadvantages flowing from the lack of international cooperation may be illustrated by examples taken from the field of insurance. As the operations of life insurance have become international, the scientific and technical activities connected with insurance have already been given an international organization in the Actuarial Congress. This interest has not, however, as yet been provided with public organs of international administration. The attitude of various national administrations illustrates the difficulties created by a lack of uniformity in regulations. Thus, the German Government demands that any foreign insurance company doing business in Germany shall submit its transactions in all the countries of the world to the control of the German administration. France has recently established the requirement that all insurance companies operating in that country must invest solely in French public securities, which pay at the present time an interest of about three per cent. These regulations are plainly due to the solicitude of the national administration for its subjects who may become insured in foreign companies. But consider what a burden is placed upon the business of insurance — a burden which of course must ultimately be borne by the insured. If each government should demand an account of the entire business of a foreign insurance company for the purpose of complete control, the expense and burden involved would become intolerable. When the governments of the older states require investments to be solely in their own low-interest-paying funds, they exclude the insured from the advantage of perfectly safe investments in new countries at nearly double the rate of interest. All these difficulties would be avoided could there be created an international bureau for the auditing and control of insurance investments. Investigations of the

business of a particular company made once for all with perfect methods on a world-wide basis could safely be accepted by any national administration, and all the advantages open to investors the world over could thus be enjoyed by the insured of any international company.

Whenever we are considering any body of law, it is of interest and importance to inquire how its individual principles are enforced. With respect to international administrative law reliance must in the main be placed upon the enlightened sense of self-interest of the national administrations. In as far as they themselves realize the importance of these arrangements to themselves and to the interests intrusted to their care, will they be ready and willing to enforce the principles of international legislation without any ulterior sanction. In the present condition of the world, it will perhaps for some time be impossible to strengthen the administrative organs of the international unions so as to provide them with powers of execution against national administrations. Some means of stricter enforcement have indeed been provided. In some of the unions the individual governments are required to furnish annual reports upon their legislative and administrative action with respect to the interests in question. It is understood that if these reports show that the requirements of the union have not been fulfilled, the public opinion of the world, diplomatic pressure, and ultimately exclusion from the union will be sufficient to provide a sanction. In this matter we have to rely upon the accuracy of the reports which the various administrations are bound to furnish, but we may rest assured that generally they will be careful to have their official reports correspond to the facts. How important these reports are to international administration is illustrated by the case of such a union as that for the prevention of phylloxera. Each administration is bound to report upon the occurrence of this disease in its wine-producing regions, and upon the methods that have been used for its suppression and for the protection of other parts of the country. Foreign nations should be able to rely absolutely on the accuracy of these reports and upon the good faith of the government in protecting itself as well as others by a strict fulfillment of its international

obligations. When the labor-protection treaty was concluded between France and Italy in 1906 it was provided that each party must annually publish a complete report of its administration in the matter. This arrangement was criticised by French publicists on the ground that Italian inspectors would exercise a certain control over the French administration, and that the convention gives to each Government the right of superintending the labor police exercised by the other. And yet it is inconceivable how the enforcement of treaties of this kind may be secured without such means of international intelligence. Another method was employed by the union for the protection of submarine cables. The conference of 1886 appointed a commission on the enforcement of the treaty, which examined the laws and practice of all the treaty states and reported as to which of them were not giving effect to the convention. In the labor conference of 1890 Germany proposed that the execution of the treaty measures should be secured by a sufficient number of functionaries — specialists appointed for the purpose. The representatives of Austria, however, cautiously urged that the surveillance of the national administration should be reserved to each government without any interference by an outside power. This objection indicates the difficulties which have to be met in an attempt to secure good faith and complete observance in the matter of international administrative treaties.

When all is said, it is plain that the real sanction for the international law thus created lies in the eventual exclusion from the union of a state which persistently neglects or refuses to fulfill its obligations. In some of the unions this sanction is amply sufficient to secure the careful observance of treaty obligations. An international union may be so necessary to the economic life of the member nations that exclusion from it would be almost a national calamity, an eventuality to be avoided at almost any cost.

The realization of this necessity, of the fact that economic life within the national state is dependent for its prosperity upon international cooperation and membership in international unions, serves as a balance to the ever-present desire to preserve sovereignty unimpaired and the freedom of national action unembarrassed. When at

the labor conference in 1890 it was proposed by the Swiss delegates that an international bureau of labor should be established, the British representatives objected on the ground that they could not put their labor legislation at the discretion of a foreign power. The feeling thus expressed is still a very strong impediment to the progress of international legislation. It seems, however, that the world is passing from this attitude to another and more liberal view of the situation. The view which national governments have generally taken regarding international cooperation is that everything must be avoided which would constitute a derogation of the complete rights of sovereignty. However, it makes a great deal of difference how this principle of caution is applied. When all international action is regarded as endangering national power, the question which governments will ask themselves when such action is proposed will take the following form: What is the least measure of concession which, with a due show of international courtesy, we can make to this demand? But after the usefulness and even necessity of international cooperation have emerged into view more and more clearly, and when the governments recognize that, in order to be completely useful to their subjects and citizens, they must join in these movements, they will ask themselves: What is the largest measure of aid and cooperation which we can give in this case with safety to our national interests? In other words, the international activity is no longer looked upon as an outside hostile force, to which only the least modicum of concession ought to be made; but it is regarded as a useful and necessary cooperative enterprise in which each state should join as far as its special circumstances will permit.

Although this is not the place to review the theory of sovereignty, it is evident that the old abstract view of sovereignty is no longer applicable to the conditions in a world where states are becoming more and more democratic and where the organization of interests is taking on an international aspect. It is undoubtedly a mistake to look upon sovereignty as an irreducible entity including the sum of all political and social power. It is therefore not justifiable to proclaim that sovereignty would be destroyed if any administrative activity of the national government is curtailed or transferred.

Sovereignty in the modern organization of the state is merely the focal point at which the political energies of the nation converge. It represents the strongest social purpose to which at certain times all other social purposes may have to yield. At present the paramount social purpose in the civilized world is still the maintenance of national power. It is the national organization upon which the safety of the material and moral interests of the world still reposes. But there are always large groups of interests which will not be dominated directly by the sovereign state, and whose activities are independent of the latter. The sovereign purpose, while it may eventually dominate, does not by any means at all times include, all other social purposes.

The creation of international groups of interests which we are witnessing may in the long run have a tendency to change this focalization of power. There may ultimately be created an international consciousness, interest, and organization so powerful as to make itself the paramount social force. This will not be the work of a single generation, nor will it be brought about through conscious political arrangements. If it does take effect, it will come as a result of inevitable groupings of social interest and power. Should it arrive, it will gradually make national sovereignty obsolete. Such a consummation, though its occurrence is not likely for some generations to come, could not be prevented by a narrow national policy which would attempt to block the normal and natural grouping and organization of interests the world over. We ought therefore not to speak of an abdication of sovereignty simply because one or several interests have been organized on an international basis. The national state still remains on the center of the stage. It merely utilizes these international organizations for the benefit of its own citizens and subjects.

It would also be a mistake — though this error has not always been avoided — to speak of sovereignty as a principle of international law. But it is plain that international law does not bestow sovereignty upon the state. On the contrary, it clearly regards sovereignty as a question of fact, and simply discusses the conditions under which a certain society may be said to have achieved a sufficient

political organization to be recognized as sovereign. Sovereign states, independent political persons, are the agents in international law whose importance is determined by the degree of vigor and efficiency with which they act in the community of nations, but not by their isolation and withdrawal from contact and cooperation. The main principle of international law is community of interests; upon this the law must be based if it is to be respected. Through membership in the international law union the personality of the state is developed, as is the individual through social life. These common interests are based on fact as undeniably as is the sovereign power. States have intercourse with one another; they and their citizens need it, and so it will be continued. The relations thus established must be given a normal, orderly form. Though, therefore, we as yet stop short of creating or admitting an international jurisdiction, we have long had an international procedure and we are fast developing international administrative law.²

Through the essential mutuality of the relations of civilized life the sovereign state is practically forced to avail itself of the advantages offered by international organization. It is plain that the individual, isolated national government is unable to secure for its citizens all the advantages of civilization. Relying merely upon the capacities and resources contained within its national territory, it can not offer to those dependent upon it the protection and the advantages which as citizens of the modern world they have a right to demand. If we consider the most fundamental and rudimentary duties of a civilized state, the protection against disease and crime, we immediately discover that the resources of a national administration are inadequate to afford complete protection to the citizens. The organization of crime rests on an international basis. Like anarchism, which we have already mentioned, the so-called white-slave trade illustrates the principles involved. The criminal laws of any individual state can not reach the offenders so as to protect its subjects against this most heinous exploitation. Nor is it possible for a state to protect itself against the influx of disease unless indeed

² See, in this connection, Nippold, *Fortbildung des Verfahrens in völkerr, Streitigkeiten*, 1907, Chap. 1.

it should, in Chinese fashion, cut itself off entirely from commercial intercourse. In all these matters, it must rely upon cooperation with other national administrations, and only in a normal and well-regulated system of international police and sanitary administration can security be found. Similarly, a complete right to a patent or to the reproduction of a literary work can not be given by any national state, but it can result only from the common action of all civilized states. The moral right which the author of a book or an invention has, to be paid for the worth and utility contained in the product of his mind, can be protected only within narrow limits by an individual state. Its complete establishment is a matter for which universal legislative arrangements are necessary. Numerous examples of this kind will immediately occur to the reader. It is evident that there are growing groups of advantages which are obtained by men as members of civilized society rather than of any particular state. Such advantages the states owe it to their citizens to foster and develop, in order that the latter may enjoy what in reason they are entitled to. The state is powerless to create these advantages by its own unaided efforts. It can secure them for its citizens only through cooperation with other states.

International cooperation may at the present state of our civilization be represented as an ethical duty. No state has the right by headstrong aloofness from international movements to exclude its citizens from the advantages of civilization. But this ethical duty is reinforced by a very practical necessity, which is plain to any common-sense administration. As a matter of fact, the state which would isolate itself from the Postal Union or the Sanitary Union would act in as irrational a manner as an individual who would leave the abodes of civilization to pass his life in the unhealthy and inhospitable wilderness of a swamp. The laws created by international cooperation have an actual and potent sanction in the suffering and loss which are inevitably consequent upon their nonobservance. If we consider for a moment the international organ to which the most positive powers have been given, the Sugar Commission, we will recognize the workings of necessity in its creation. The far-reaching powers which have been given to this body did not result

from any preconceived plan that the establishment of an international authority of this kind would be desirable. On the contrary, they were forced upon the unwilling members of the conference by the conditions which had been brought about on the sugar-producing world by the practice of granting national bounties. The disastrous results produced by this species of national competition could be avoided only by the creation of a powerful international authority. The evils were so great that the measures for their removal presented themselves to the delegates in the form of unavoidable necessity; and they acted in accordance with the conclusion, although they tried to improve the appearance of their action by substituting the word "executory" for "obligatory" in speaking of the determinations to be made by the commission. The decided step forward which was thus taken in the organization of international unity was due not by any means to theoretical considerations, but to the presence of a practical condition which demanded specific action of this kind.

The development of international administration is favored in general by the principle that action will not be taken unless all the parties are agreed as to its desirability. In the older type of treaties between nations the purpose was the conciliation and compromise of conflicting interests. The new economic treaties strive to discover, on the contrary, a basis for cooperation, an essential equality of interests between all the nations upon which permanent international arrangements may be founded. The unanimity required for this kind of legislation can not, however, be permanently defeated by mere capricious opposition on the part of one or several states. When it is once clearly discovered that a basis for international cooperation exists, the reluctant states will generally be forced in the event to accede to the agreement, because they very soon find that exclusion from the advantages of the union means a serious loss to their own interests.

The effect of this new development, which we have been reviewing, upon the spirit and the methods of diplomacy can not but be salutary. Although diplomacy has not yet entirely lost its old popular reputation, according to which its methods were held to be synonymous with shrewdness, scheming, and chicanery, it is clearly apparent that

a very different point of view of international relations is obtaining the leading influence in the diplomatic world. Instead of dealing only with the nice balancing of political interests, and attempting to gain more or less ephemeral advantages by shrewd negotiation, the new diplomacy makes its main purpose the establishment of a basis for frank cooperation among the nations in order that, through common action, advantages may be obtained which no isolated state could command if relying merely on its own resources. John Quincy Adams, in his Diary, says of a certain British diplomat: "The mediocrity of his talents has been one of the principal causes of his success;" and in the past merely neutral social virtues were indeed often accounted sufficient for diplomatic efficiency. The present makes more exacting requirements, and as the complexity of economic and social interests increases, efficient diplomats will have to be men of "great energy of mind, activity of research, and fertility of expedients," to use the words by which Adams expresses the qualities not so essential to ordinary diplomatic intercourse in his day. In order adequately to represent his nation, a minister ought to keep himself informed, through touch with expert opinion and with the progress of affairs, of the various world-wide economic, industrial, and intellectual activities, by which the welfare of his nation is intimately affected. A diplomat who masters these relations and keeps himself advised upon these movements will be able to secure many advantages for his own country, and he may, moreover, perform important services in helping to work out a basis for effective international cooperation in fields where such action is required by the very interests of his own nation.

The process of international organization frequently favors the expansion of the sphere of the national government. When interests are organized upon an international basis, the persons and associations concerned begin to see more clearly how their purposes may be furthered through state action. They consequently demand new legislation as well as the expansion of the administrative sphere, and urge the government to use its organs for the purpose of securing the greatest possible advantages for the individual citizen. The example of other nations is appealed to, and in every way the state is encour-

aged to make the fullest use of its powers. The organization of the agricultural interests upon an international basis, recent as it is, has already produced an insistent demand for greater state activity. The control which the state exercises over the conditions of labor is stimulated to greater action by the international agreements and conventions on that subject. In our country the agitation for a parcels-post service proceeds mostly from those persons who have realized the advantages which national industry may gain in foreign markets through the use of this method; so if this system should be introduced it would be due very largely to the importance of international relations.

It is very important to note that the organization of the economic and social activities of the world is being based upon the representation of interests in definite organs. While the parliamentary systems of the national states are still based on the abstract quantitative idea, the more natural system of interest representation is being used in international affairs. Undoubtedly the international movement will be strengthened by this fact, because a social or economic interest is an entity possessed of independent potentiality of action. If world organization spontaneously takes this form from the beginning, it will profit by the combined energies which all these interests represent.

The effect which international organization has exercised upon the methods and processes of national administration has been salutary. In the international conventions and congresses, methods are compared, criticisms and suggestions are made, and the best experience of the world is centralized; all of which may be turned to advantage by progressive national administrations. Moreover, a certain responsibility comes to be felt by the individual governments, over against each other. It would be embarrassing to be discovered in the use of antiquated and unscientific processes. The result is a greater efficiency of administrative action throughout the world. Moreover, through the public organization of scientific bodies, the latest results of pure and applied science are placed at the disposal of governments. The scientific branches in the administration of modern states are so important and their influence upon governmental

action is so direct that the organization of scientific work upon an international basis would in itself constitute a movement of prime importance.

It would be interesting to compare the internationalism of the present with the cosmopolitan movements which the world has seen at former periods of its history. A distinct difference separates the cosmopolitanism of the close of the eighteenth century from that of our own days. The rationalist cosmopolitanism is still current in much of our literature, although in practical affairs we have almost entirely outlived it in this particular form. It is individualistic and humanitarian, and recognizes no institutions between the individual and humanity. Every person is supposed to be inspired with a feeling of universal human brotherhood, and to strive for the abstract purposes of humanity. Cosmopolitanism of this kind caused Byron to weep when the enemy of his country was defeated, and Goethe to look on with indifference when the land of his fathers was invaded by the troops of Napoleon.

The cosmopolitanism of our days is concrete and practical. It rests upon the idea of cooperation in constantly expanding circles. For this purpose, adequate institutions must be created in order that international action may become real. The national state is not regarded as a superfluous obstacle. As international advantages are essential to the citizen, so the state remains necessary to the achievement of internationalism. The temper of the age is positive and constructive rather than given to idealism and speculation. The void which the old cosmopolitan ideal left between the individual and humanity is being filled up by the creation of institutions through which the individual may gradually be raised, by almost imperceptible degrees, from the narrow limits of personality to the broad aims of civilization. This internationalism respects ethnic and national entities as essential forms of social organization within their proper limits; just as the modern state respects the autonomy of towns, provinces, and member states, because out of these component elements it is itself constructed. As through the consciousness of the city and of the national state we gradually develop into a consciousness of world unity, we shall not be able to dispense with

the earlier psychic unities which at the present time lie back of national sovereignty and give it its force. The positive ideal of the world to-day is undoubtedly that the whole earth shall become a field of action open to every man, and that all the advantages which may be secured by the action of humanity throughout the world must be guaranteed to the citizens of each national sovereignty. A new grouping of social, economic, and political interests is being effected, in which, though indeed the national state will continue to hold a prominent place, public and associative action will be dominated to a large extent by forces and considerations which are broader than national life.

This development will also exercise a profound influence upon the attitude of mankind toward war. The older pacifism which is still current among the people is purely negative in character. It looks upon war as an entity, an evil purpose which must be broken down and inhibited. It overlooks the fact that war is only the symptom of a general condition in which too great emphasis is still laid upon local interests. It is evident that the only effective manner to remove the conditions to which the periodical occurrence of wars is due lies in the constructive building up of an international consciousness. It is equally apparent that such a consciousness can not be created out of nothing — that there must be back of it the development of a real unity of interest and feeling. It is through the creation of international organizations that a positive content of the feeling of a common humanity is being provided. The question of war will take care of itself, if only international interests and organizations continue to develop. The incentive to war will necessarily become weaker and weaker as the bonds of community between nations increase, such as are provided by communication agencies, by economic and industrial mutualism, and by scientific cooperation. The ruthless interruption of the activities common to all nations will become more and more painful. There are only two alternatives — either the ties which are thus being created will in time become so strong that no nation will think of interrupting them by war, or, if war is to be maintained as a solution of international conflicts, many of these relations will have to be excepted from its operations

and will have to be given a character of permanence so that they may continue in force even during hostile action between nations. Such an exemption of the common interests of mankind from interference would tend to confine the sufferings and dangers of war more and more to the active combatants, a result which would certainly be in accord with the dictates of humanity.

While the vista of possibilities thus unfolded is attractive and of great promise, it is nevertheless true that the movement which we have been considering would be retarded and injured by too great expectations and by action which would overlook the present just claims of local autonomy. The basis for cooperative action will gradually unfold itself; and as it does so, the principles of international legislation and administration will assume a character of inevitableness and will be recognized by the individual state as subserving its own interests. Individual initiative, to be effective, should be confined to assisting in the discovery and clear expression of such unquestioned bases for cooperation. Any attempt to urge states into action without showing a specific need, on the mere plea of the interest of internationalism, would be in so far to jeopardize the normal development and ultimate success of the great movement which is one of the most notable phenomena of the era in which we are living.

INTERNATIONAL UNIONS — GENERAL PRINCIPLES OF ORGANIZATION

At first sight there is little promise of accord in the details of organization and in the methods of the various international unions. They have been founded for a great variety of purposes, and deal with a multitude of interests representing every branch of human enterprise and endeavor, and having but little in common. There has been no general concerted plan among the governments with respect to the international movement which we are reviewing. The individual unions are rather the result of a spontaneous growth and crystallization of interests than of carefully elaborated general plans of action. Each one of them has naturally followed that course of development which its own specific purpose has indicated. But when all has been said and when all these reservations have been

made, there is yet discoverable an underlying unity in the movement which enables us to treat it as dominated by certain general principles, no matter how variegated and complicated its individual manifestations may be. In the course of the comparatively short life of the various international unions, there have indeed already been developed individual bodies of law, of method, and precedent, which may lay claim to being important and separate entities in the field of jurisprudence and administration — which consequently require separate study and are, as a matter of fact, dealt with in separate treatises. We need only think of such bodies of international legislation as the European railway freight law, the law of international copyrights, and the rules created by sanitary conventions. Yet, if we desire to form an estimate of the tendencies of the international movement and of its relations to national life, it will be necessary to attempt a general survey of the principles and methods employed. Such an attempt to arrive at a conception of what may be considered the normal action in this great movement will give us a criterion by which individual proposals and arrangements may be judged. It will also enable us to form a more accurate and better informed judgment of the general importance and tendencies of international administrative activities. Finally, it will protect us from the not uncommon error of exaggerating the importance of the functions created and of the positive powers which have been attributed to these new international organs.

Formation of unions

It is not always easy to tell with certitude whether the formation of a given union is due primarily to public or to private initiative. We note commonly an interaction of influences. Private associations or groups of individuals may discover the need for international action with regard to a certain interest and may undertake to urge the establishment of international treaties and administrative bodies. Quite generally, such persons will themselves organize upon an international basis, will hold international conferences, or congresses, where the feasibility of common policies and actions is discussed at length, and where proposals for public unions frequently originate.

Thus, certain states may finally be moved to take authoritative action in the matter in question, with the result that treaties and conventions will be concluded; or the state organs, desiring to come in closer touch with the efforts of private initiative, may associate themselves for awhile with the organizations already established; they may send official delegates to the conferences of the international associations, and out of this cooperation there may be evolved gradually a basis for public international action.

In a large number of cases, however, unions have been formed directly by public or state initiative. In individual cases, nations had realized the necessity of treaty arrangements on such subjects as the control of communication by telegraph, railway, or the mails. The individual treaties, multiplying year by year, containing many divergent provisions, had a tendency to render the subject unnecessarily complicated and difficult for the national administrations. Thus, there came about naturally a desire for unification on a general international basis. At other times the technical branches of the national administration discovered in their practical work the need for a general international treaty, and, setting the government in motion, they secured the direct establishment of international conventions and unions.

In exercising its public initiative, the state makes use both of technical experts belonging to its administration and of the general diplomatic personnel. Occasionally, the basis for a treaty is worked out entirely by technical experts — medical men in the case of sanitary treaties, railway officials in the case of transportation arrangements, etc. Ultimately, the results thus worked out may then be discussed from the point of view of general diplomatic and political arrangements by a conference of diplomatic representatives, which affixes the authoritative seal of signature and ratification. It is also a common practice to use both diplomatic and technical delegates in the same conference. In such cases, the state, of course, expects the diplomatic representative to give to the undertaking the prestige of his office and the assistance of his political experience, in order that the importance of the undertaking may be duly emphasized, and on the other hand the action proposed may be scrutinized from the

point of view of national diplomatic interests. The general experience of a trained diplomat on such occasions is also of no little benefit to the negotiators. The technical delegates, on the other hand, are held to furnish the knowledge upon which the substantive action of the conference will be based; the latter will necessarily draw upon the experience of these men with respect to the form to be given to the enactments and with respect to the technical information upon which all its action must be founded. It is unquestioned that the presence of the diplomatic element has frequently acted as a retarding influence. The technical delegates, having experienced the disadvantages of local differences in legislation, enter the conference with more enthusiasm for the international idea. The diplomat, being accustomed to consider every proposal from the point of view of an undiminished national freedom of action, will suspect dangers and will, in general, oppose any limitation upon the complete diplomatic freedom of the nation which he represents. We may note in passing that participation of the diplomatic representatives in the creation of these various international unions has made demands upon the profession which the older concept of diplomatic action failed to prepare them for. It has called out new powers and new capabilities, and as these interests grow and develop diplomacy will take on an entirely different aspect and will be less characterized by the narrow shrewdness, often bordering upon chicane, which was frequently the ideal of the older diplomacy.

In these matters, private initiative is of course far bolder and more optimistic than that of the state. It is not beset by the ever-present care to preserve national sovereignty intact, nor does it view every interest from the point of view of national organization. But the very lack of responsibility may at times also be a disadvantage, as is also the lack of technical experience when questions of detail in public administration are involved. Private initiative will frequently assume that international society has already been created, ignoring the fact that for the time being the realization of these international interests still depends upon the efficiency of the national administrations. In its zeal it is apt to forget the natural limitations upon administrative action, and for international purposes will

demand acts of governmental interference which it would scarcely tolerate if demanded from the point of view of national policy. The manner in which private initiative often loses the proper perspective is illustrated by the second congress against white slavery, which recommended that the postal administrations should not deliver *poste restante* mail to young girls without the consent of their parents. The difficulties of administration which such an arrangement would make necessary were certainly not given due consideration.

The great unions dealing with the communication interests were all the result primarily of public initiative. Treaties between two powers or a group of powers grew up and increased in numbers until, as pointed out above, the unification on an international basis presented itself as the only rational and practical solution of the difficulties. The definite suggestion of some of these unions, such as the Railway Freight Union, came indeed from private individuals, who worked out preliminary projects of action; but in all these cases the definite steps leading to the establishment of the unions were taken by public authorities. The great sanitary conventions of the last two decades were also the result of public initiative, although in these cases a long series of expert technical conferences preceded diplomatic action. In a similar way the unions dealing with the metric system, the suppression of the slave trade, the sugar bounties, and the publication of customs tariffs were created by public agencies, as was also the scientific union for the study of geodesy. The international unions dealing with the police of the high seas, as well as the organs dealing with specific local affairs, such as the Danube Commission and the Egyptian Caisse de la Dette, present themselves under the aspect of an extension of national organs of administration for the protection of interests beyond the boundaries of the state, and were therefore naturally the result of direct public initiative.

Private initiative leading toward the creation of international organizations has been most active and effective in connection with general economic interests in which the individual state administrations were not so necessarily and directly involved as they are in the control of communication, sanitation, and the police. In the three important fields of literary and industrial property, labor

legislation, and agriculture, the public unions which now exist are the result primarily of a determined and persistent private initiative. Two societies, the International Association for the Protection of Industrial Property and the International Literary and Artistic Association, agitated for the adequate protection of intellectual property and worked out definite projects for international conventions. Urged on by this initiative, individual states thereupon took the necessary steps to bring about the convocation of diplomatic conferences through which the subject-matter was given its authoritative form and through which the international organs dealing with these matters were created.

Among all the subjects concerning which international action has been taken, none perhaps illustrates more strikingly than labor legislation the necessity of such action — its naturalness, in fact — but at the same time the great difficulties which oppose themselves to the realization of any general plan of operation. Early in the development of the international movement, it was realized that national labor legislation would ultimately have to be supported by international understandings. It would evidently be impossible for an isolated nation to institute a system of perfect protection for its labor forces, while those nations who were its principal competitors in the industrial field continued in the use of a system under which labor forces were exhaustively exploited. Another reason for international arrangements in this matter was found in the fact that the labor supply is becoming more and more an international commodity. No longer based exclusively upon the native element in any one state, it is determined rather by importation and exportation of labor forces, whose temporary cooperation with the national laborers of itself necessitates some kind of international understanding on labor legislation. Various international associations of a private nature were formed, composed either of the direct representatives of labor striving for a more complete recognition of its needs, or of persons who interested themselves in the situation of the laborer from a scientific or humanitarian point of view. The labor interest, both in its economic and scientific aspect, therefore received an international organization which corresponded to the economic facts involved. A

strong sentiment for the founding of an international union of states dealing with labor problems was thus created. A number of governments sent delegates to the general assemblies of the International Association for the Legal Protection of Labor, giving this organization a quasi-public character. Finally, a diplomatic conference was convened in which certain proposals that had been worked out by the association were discussed and where certain general legislative principles were adopted. The first suggestion leading towards the establishment of the International Institute of Agriculture was made by a private person who brought his ideas to the attention of various governments. The suggestion was finally taken up by the King of Italy, and public initiative thus took the place of private suggestion. The ideas of the originator of this movement had also been discussed and endorsed by the International Association for Agriculture, a private organization. In this case, the action taken by the public authorities fell far short of what had been expected by the original sponsors of the movement. Instead of creating an organ empowered to take direct action for the protection of the various interests of agriculture, the diplomatic conference which acted as a constituent assembly in this matter did not go beyond creating an international intelligence bureau, the administrative functions of which are very limited.

Private initiative has also brought about the creation of international unions with respect to penitentiary science, seismology, the repression of the white-slave trade, and the great humanitarian enterprise of the International Red Cross Association.

After a union has once been created, admission to it is, as a rule, granted freely. Any state may therefore ordinarily acquire membership by merely declaring its adherence to the conventions concluded, and by assuming the burdens imposed by the international union. Such adherence is ordinarily notified to the "directing state" — the government in whose territory the international bureau is established — and by it communicated to the other member states. This method prevails in nearly all the international unions. An exceptional method is followed in those unions in which very special burdens are imposed upon the treaty states. Thus, in

the European Railway Freight Union the request of any state to be admitted to membership must be addressed to the directing state; it will be referred to, and reported on, by the bureau, submitted to the member states, and acted upon by them. Unanimous action of the latter is necessary in order that a new member may be admitted. In the Sugar Union, the request for admission must be acted on by the commission of the union, to whom it is transmitted through the Belgian Government, which is, in this case, the directing state. Admission to the Union for the Suppression of the Slave Trade may be made subject to certain conditions, which are applied upon motion of the treaty states. The common law of international unions may therefore be stated to be that the unions are open to all nations who are ready to assume the burdens imposed, and that the membership of all civilized nations will be encouraged. The purposes of these unions can, of course, be fulfilled best with a complete membership, including all the states of the world. Some of the unions, such as the Postal Union and the Agricultural Institute, closely approach this condition.

In certain unions membership is limited by natural causes or by the specific nature of the purpose for which the union has been created. The Union of American Republics is limited by a geographical fact. The European Railway Freight Union, the North Sea Fisheries Union, the Danube Convention, are other examples of limited purposes, which imply a limited membership.

Organization

The method of organization in the international unions tends towards uniformity. There is a general system which may be considered as the normal scheme of organization, although all its individual parts will not be found in every one of the unions. The tendency toward imitation has manifested itself in this field as in other fields of social enterprises. Methods of organization which, though established against great opposition, have subsequently proved their usefulness and thus justified their existence will naturally be imitated in the creation of new organizations.

The constituent assembly and general legislative organ of the

international union is the conference or congress. The use of the former term is becoming more general, although the meetings of the Postal Union are still called congresses, while in the case of the Agricultural Institute the term "general assembly" has been employed. The attempt to distinguish sharply between the term "congress" and "conference" seems to be futile. As used in general diplomatic language, the term congress may be said to refer to an important assembly of plenipotentiaries for the discussion and settlement of a definite political situation demanding immediate action by the powers. In this manner, the term is employed in connection with the Congress of Vienna, the Congress of Paris, the Congress of Berlin, etc. Congresses of this kind have in the past been called when, as the result of a great war, the political equilibrium had been destroyed and when vast interests were in the balance, requiring authoritative and immediate settlement. The term conference is used more generally where the subject of discussion is some specific interest or group of interests. A conference does not ordinarily work in the presence of a political situation which imposes upon it certain imperative demands of action. It rather deals with matters in which action seems advisable, in which mutual counsel should be had, but in which the present necessity of action is less urgent. The term is therefore applied even to the general Hague Conference, in which the most important interests of nations are discussed by plenipotentiaries. If the phraseology were determined by the importance of the interests involved and by the diplomatic character of the delegates, the term congress certainly should be applied to the meetings at The Hague. The only element which distinguishes these meetings from such as those to which the term congress has been applied in the past is the absence of an urgent political situation calling for immediate international action of a fundamental and pervading nature, such as that taken in 1815, or 1856, or 1878. It may, however, be that the term congress is destined to entire disuse in connection with the meetings of public representatives. At present the meetings of the Postal Union are still called congresses. The technical reason assigned for this usage is that the postal congress has the right and function of making changes in the original

convention; as distinguished, for instance, from the conference of the Telegraphic Union, which can not modify the original convention, but must confine its action to the provisions of the administrative *règlement*. The reason for this usage is, however, not of universal validity, because, like the postal congresses, other conferences of the union may inaugurate changes in the fundamental conventions; or meetings especially convoked for the purpose of making such changes are designated as conferences and not as congresses.

On the other hand, the usage is growing up of giving the name congress to large international meetings of private individuals. Thus, we speak of international scientific congresses. In this manner a change in our phraseology seems to be taking place; the more dignified and formal term congress being now used for meetings which have no public or authoritative character, whereas assemblies which enjoy diplomatic powers or a public initiative are almost uniformly designated as conferences.

The conference of an international union may either meet at periods the occurrence of which is definitely fixed in the convention, or, in a smaller number of unions, at a time determined by the preceding conference, or by the commission of the union. Thus, for instance, the conference of the Geodetic Union meets every three years, while that of the International Union of American States meets at a time determined by the governing board of the Bureau of American Republics. The conference acts both as a constituent assembly and as a legislature. As the original convention was the work of a conference, so, in general, changes in the convention or in additional acts may be inaugurated by the conference. The ordinary legislation of the union, contained in the *règlements*, is, of course, also subject to action by the conference, although in some cases the initiative in this matter is delegated to the commission. The conferences engage in discussions of questions of general policy, in the comparison of methods, and in the criticism of results. In the scientific unions, the advances made by the particular science, reports of investigations, and the determination of methods to be employed in future investigations, constitute the principal subjects of discussion, outside of the technical rules which may be made for the guidance of the executive organs.

For action in congresses and conferences, unanimity is the general rule. Readiness to subordinate national interests to the rule of a majority of states has as yet not been developed to any large extent. Each member of the union reserves to itself the right to approve or disapprove of any important change or innovation introduced in the organization. It is a general principle of the action of international unions that it must not bear upon subjects in which the solidarity of the nations interested is not fully recognized. As long as differences of interest are keenly felt, common action is impossible. Of course, it always remains open to the nations which desire a certain course of action, not yet favored by the totality of the membership, to form a restricted union for the specific purpose of enjoying among themselves the advantages of the arrangement proposed. If this action is really of such a nature as to be inherently advantageous to all states without distinction, the tendency is for such restricted unions to grow larger until they finally absorb the entire membership of the international union. In these matters, reliance can therefore not be placed upon the mere force of the majority. The only force that may be attributed to it is that inherent in the reason and practicalness of the ideas suggested, which may ultimately bring about unanimity among all the nations concerned. In order that any action should be had, it is therefore necessary that at least a modicum of common standing ground should be discovered. At times this is favored by the feeling that something must be done by an international conference in order that its existence may be justified.

There are certain exceptions to the rule requiring unanimity of votes in the international unions. In the general assembly of the Agricultural Institute, two-thirds of all votes constitute a quorum and can therefore take action. The Sugar Commission, which enjoys certain legislative powers, acts by a majority of votes. The same is true of the Superior Council of Health at Constantinople. In the Postal Union, a peculiar provision obtains. In the interval between conferences, suggestions for changes in the legislative arrangements of the union may be proposed by any three member states. Such proposals will then be submitted to all the states in the union.

In order that they may be adopted, unanimity is necessary only in proposals affecting the most important parts of the convention; with respect to other parts, a two-thirds vote, or even a simple majority, is sufficient.

In nearly all the unions a distinction is made between the convention and the *règlement*. The former determines the organization of the union, together with some of the fundamental principles upon which it is to operate. Thus, the postal convention, for instance, establishes the principle of free transit and rules defining the responsibility of the various administrations for losses of postal matter. The ordinary operations of the union are regulated by the *règlement*, which has the juristic character of an administrative ordinance. Changes in the convention necessitate diplomatic action, and require, therefore, greater formality as well as more extensive deliberation. The presence of diplomatic representatives is always necessary when a convention is to be changed. Changes in the *règlement*, however, may be made by technical delegates; or even in certain cases the function of determining the administrative rules may be delegated to a commission. The commission of the Sugar Union, for instance, elaborated the *règlement* (June 20, 1903) which makes detailed regulations of an administrative nature respecting the customs treatment of sugars, their transit, importation, etc. The administration of sanitary affairs in the ports of Turkey and the near East is determined largely by the *règlements* worked out by the councils of health at Constantinople and Alexandria.

The next organ of the international unions to be considered is the commission. The commission may be defined as a governing board whose duty it is to superintend the administrative work of the union, carried on by the bureau and other agencies. As just stated, the commissions are sometimes intrusted with the duty of preparing administrative regulations, or even, as in the case of the Sugar Union and the sanitary councils, of working out a complete code of administrative action. Their administrative control is therefore at times of such a nature as to assume a quasi-legislative character. The commissions also exercise a certain fiscal control over the expenses of the bureaus of the union, and in some cases arbitral func-

tions have been intrusted to them. The international commission is a recent development marking a more complete evolution of the international union. In the older unions, commissions have not been instituted, but the function of control which is exercised by the commission is in these intrusted to the government in whose territory the international bureau is situated.

The commission is composed of representatives of the treaty powers. In some of the commissions all of the treaty powers are represented. Thus, the governing board of the Bureau of American Republics is composed of the representatives of the Latin American republics at Washington, under the presidency of the American Secretary of State. The commissions of the Sugar Union and of the International Institute of Agriculture are also composed of representatives of all the treaty states. In some of the unions, however, the commission is elected by the conference, and contains a smaller number of members than the number of treaty states. Thus, in the Metrical Union the international commission is composed of fourteen members, half of the committee being renewed at each session of the conference — *i. e.*, every six years. The permanent commission of the Geodetic Union is composed of two *ex-officio* members and of nine others nominated by the conference. Four or five of the positions are refilled at each meeting of the conference, every three years. Other unions which make use of this organ are the Penitentiary Union, the Union for the Exploration of the Sea, Hygiene and Demography, Seismology, and Formulæ for Potent Drugs.

The requirement of unanimity is not usually applied to actions of the commissions. Even the Sugar Commission, which is intrusted with the most important powers, acts by a majority of votes. As the administrative and quasi-legislative functions of these commissions grow in importance, the principle of international action will be strengthened, especially on account of the absence of the majority requirement. The commission will therefore be seen to constitute an important step in advance in international organization, as implying that in some cases nations have come to recognize the necessity or desirability of subordinating their special wishes to the will of

the majority. Most of these unions, it is true, deal with scientific interests, and the functions of their commissions are therefore not apt to result in political action. But the establishment of the principle of majority action is nevertheless favored by this form of organization, and especially by the admission of that principle in the Sugar Union, which deals with most important economic and fiscal interests.

Practically all the unions make use of a central office or bureau as their chief administrative agency. The bureau is the connecting link between the various national administrations. It furnishes to them information about the interests of the particular union, acts as intermediary between the governments, and carries out the specific administrative duties assigned to it in the *règlement* of the union. Though the duties of the bureau are chiefly informational, instances are not lacking where more positive powers of administration and even arbitral functions have been intrusted to international bureaus. While the term "bureau" is the ordinary designation, the words "secretariate" or "office" are also occasionally employed. All the unions which use the commission employ also the bureau as an administrative agency; in addition, the following unions have international bureaus: Telegraphy, Postal, Railway Freight, Industrial and Literary Property, Publication of Customs Tariffs, Labor, Slave Trade, and Catalogue of Science.

It remains for us to consider the functions of the directing and supervising government — *i. e.*, the government in whose territory the international bureau is situated. It is the ordinary practice to locate the central office of an international union in a small neutral state. Thus far, Switzerland has been the favorite home of international unions, containing central offices of the Telegraphic, Postal, Railway, Industrial and Literary Property, Labor, and Penitentiary unions. The preference accorded to Switzerland over Belgium and Holland may be explained by the fact that Switzerland is perhaps considered more fully independent of extraneous influences than is either Belgium or Holland. It is also, as far as Europe is concerned, more centrally located. More recently, a number of bureaus have been located in Belgium (Customs Tariffs, Sugar, Slave Trade, Potent Drugs). The jealousy which formerly prevented the location of

bureaus in the territory of more powerful nations seems to be yielding somewhat at the present time, for in addition to the older scientific bureaus, the new Bureau of Hygiene has been established at Paris, while Germany harbors the central office of the two scientific unions of Seismology and Geodesy, and Italy has become the home of the International Institute of Agriculture. In the unions which have no commission or governing board — this is the case with most of the unions located in Switzerland — the regulation of the administrative organization of the bureau and the general supervision of its work is left to the directing government. The bureaus situated in Switzerland are under the control of one of the Swiss Departments, such as the Department of Post-Offices and Railways. The policy of Switzerland with respect to the civil service of these bureaus has been criticised, because of the somewhat narrow policy of confining appointments to these positions to Swiss subjects. The total advantage which Switzerland draws from this arrangement, however, is not very extensive, as the budgets of all these unions are exceedingly small. In Belgium, the Anti-Slavery and the Customs Tariffs bureaus are under the direct charge of the Foreign Office. The Bureau of American Republics comes under the control of the Government of the United States only inasmuch as the American Secretary of State is the president of the governing board of the bureau.

In unions which use the commission as the organ of control, the directing government simply exercises the function of a diplomatic intermediary between the treaty states and the bureau. Thus, for instance, communications to the Sugar Commission are made through the Belgian Government. There seems to be a certain reluctance to permit the international commissions or offices to establish direct relations with the treaty governments. They may indeed in some unions furnish information through routine correspondence, but more formal matters are usually communicated through the foreign office of the government in whose territory the bureau is situated. The Bureau of American Republics corresponds with the governments composing the union only through the diplomatic representatives of these governments in Washington. Direct correspondence with any government is permitted only in the absence of diplomatic representation at Washington.

Legislation

A general review of the field of legislation as occupied and developed by the international unions reveals that there are three classes of legislative arrangements in which all the legislative acts of unions may be grouped. The most notable of these classes contains the efforts which are made to bring about a unification of the substantive law governing any international interest. Uniformity of legislation is an ideal which under the present conditions of national life can be applied only to a limited number of general principles. Moreover, it is not in all fields of legislation that the process of international unification is at the present time considered as feasible, even in a partial form. There is, however, one branch of legislation in which a unifying activity is demanded by the most essential characteristics of modern civilization. The development of rapid communication has very nearly made the world into a unit in as far as the transmission of intelligence and the transportation of passengers and goods are concerned. Even before this advantage had been achieved, the convenience of having a uniform law in matters of transportation by sea and land was generally recognized. The recent developments already mentioned have only emphasized this desire for a uniform law of transportation. The most substantial achievement which has thus far resulted from the international movement is the creation of a railway freight code for the European continental states. The questions arising in transportation are here juristically treated upon a uniform basis with a result that the freight intercommunication between the continental states of Europe has been to a large extent freed from difficulties and annoyances. A determined effort is even at the present time being made to reduce the principles of the maritime law to a condition of uniformity. As the law merchant and the maritime law were originally international, or rather had the character of a world law independent of national jurisdiction, created by the spontaneous action of merchants, bankers, carriers, and shippers throughout the medieval world, even so it is hoped that at the present time, when the interests of communication have so clearly and definitely transcended national boundaries, we may again unify the maritime law and give it a world-wide currency. In the

conventions relating to the telegraphic and postal unions, certain general principles relating to duties and responsibilities of the administration have also been finally established. In some of the unions, the establishment of uniform principles of law for all the nations is indeed the prime motive of action. Thus, the international association for labor legislation works specifically toward the uniformity of labor-protection laws, and in the conventions already elaborated it is this principle which is applied to a certain limited field of labor regulation.

The second class of international legislation consists of administrative regulations. In this class, too, the ideal of uniformity is paramount — the processes of the various national administrations are to be simplified in a unifying spirit. But in addition to the unification of administrative processes, the legislation of this kind establishes certain new relations between the governments by which may be bound together administrations following in the management of their own affairs different rules of action.

The third class of international legislative arrangements rests upon a different idea. In this class it is not uniformity that is primarily sought to be achieved, but mutuality of advantages. No attempt is necessarily made to modify the details of the national administrations, but it is simply provided that the subjects of one of the treaty states shall be admitted to the advantages granted to the subjects of another, and *vice versa*. Thus, the unions for the protection of industrial and intellectual property have hitherto worked mainly with a purpose of obtaining a mutuality of advantages, so that even without any changes in the copyright law of a given state foreigners may be admitted to an enjoyment of the advantages under such legislation, in return for a similar benefit granted by their own sovereign state. But it must be noted that mutuality will after all rarely be the sole purpose of an international union. Even in the unions mentioned, the purpose of securing mutuality is accompanied by an effort to assure a minimum of protection for copyrights and patents in all the treaty states, and furthermore to arrive at a uniform interpretation of disputed questions in the law of copyrights, such as, for instance, the question of the nature of publication and of the

dependence of the original patent or copyright upon a copyright granted to the same person in a foreign country.

We may note in passing that it requires rather more of an effort to achieve uniformity of substantive law than to harmonize administrative methods and processes. The latter may be modified by mere executive orders, while a change in the substantive law of a state necessitates a far more formal act. The reaction of treaty arrangements upon the national systems of law and government is therefore far more powerful in the field of administrative action than in substantive civil law. In the scientific unions, the uniformity of processes of investigation constitutes, of course, the prime purpose of common action. The unifying tendencies of these organizations do not encounter the difficulties occasioned by national differences of administration nearly to the same extent as is the case in the unions dealing with political or economic interests. But also in the case of those unions which afford a protection against disease, such as the Sanitary Union or the union against phylloxera, no great difficulties will be encountered by the demand for uniformity when it is once made clear that the judgment of science has positively decided that certain actions are indispensable if a country is to be protected from invasion by disease. I do not mean to say that these unions will be free from the difficulties caused by national differences in administration, and by the tenacity with which local methods are maintained; yet their action will in general be less impeded by such considerations in a measure as their action incorporates the dictates of science, against which no appeal lies in matters of this kind.

The nature of the substantive rules created by international legislation is, as has already been indicated, characterized by simplicity and by the quality of being fundamentally important to the success of any course of action. Before a rule is given sanction by international treaty, its applicability and validity must have been tested to the complete satisfaction of the treaty states. Mere experimentation on such a vast scale is inadvisable. The consequences of legal arrangements must be tested either on a national scale, or in a more restricted international union, before general rules of a legal nature will commend themselves to a large group of states for permanent

adoption. And yet when the entire field of international legislation is surveyed, it is surprising what substantial bodies of law have already been created by such common agreement.

The nature of the rules created may be illustrated by the following examples: In the law of communication, the principle of freedom of transmission of telegrams, wireless messages, and letters has been established. In the European Freight Union, the duties of a common carrier are enforced in as far as the acceptance, care, and delivery of merchandise are concerned; moreover, the responsibilities of the carrier are strictly defined, so as to exclude national differences of interpretation. The Postal Union illustrates the process of international legislation quite completely. Only a few rules of practice of a very general character have been established by law for the entire union. The principal among these are the obligatory acceptance of mail matter, the rules concerning registry and indemnity for the loss of registered packages, the relations of the postal administrations to one another, and the charges to be made for international services. Other matters, also of general interest, are, in cases where a complete agreement has not yet been arrived at, regulated by special treaties, and their operation is confined to restricted unions. Among such special arrangements may be mentioned the introduction of especially low rates, declarations of the value of mail matter, the law of postal money orders, the parcels post, the collection of notes and other credits, subscriptions to papers through the post-offices, and the use of the identification book. All of these matters are administrative in their nature, but with respect to them general rules of action and responsibility must be established, whether for all nations, or for the members of a restricted union. Thus, the Postal Congress of Rome in 1906 finally established the general principle of the responsibility of postal administrations for the loss of registered mail matter.

The legislation of the Sanitary Union may be illustrated by the following details which are contained in the treaty of 1903: The national duty of notification, the declaring of quarantines and their durations, the measures of protection to be allowed an individual state with respect to the disinfection of passengers, merchandise, and

ships, and special dispositions regarding the Red Sea, Suez Canal, and Persian Gulf. The convention on labor legislation provides for uniform principles with respect to the forbidding of night labor by women and the use of white phosphorus in the industrial arts. The Sugar Union has limited the amount of duty to be levied upon imported sugar and has entirely forbidden the granting of bounties to sugar producers.

Administrative activities

The administrative activities of the international unions vary with the manifold purposes of the latter. Thus far, national governments have exhibited great reluctance against endowing the organs of the international unions with direct powers of action. As long as the union confines itself to establishing a means of communication between the governments, to giving an occasion for the periodical interchange of opinions and comparison of results, even the greatest upholder of national sovereignty will not discover any dangers in such arrangements. But once permit the organs thus created to make binding decisions or to take administrative action which the individual sovereignties are bound to respect, and an entirely different situation is created. Yet the needs of international intercourse have become so prominent that it has been found convenient in many cases to give a certain limited power of action, carefully guarded and well defined, to the international administrative organs.

Their general purpose is, of course, to serve as a link of communication between the contracting states in order that, should they desire to bring about any change in the administrative arrangements or in the relations between states in the matter covered by the respective union, they will have ready to their hand an organ through which their efforts may legally and properly be made. The bureaus of the unions are therefore quite generally charged with the duty of giving due form to demands for changes in the respective convention or *règlement*. More specific authoritative functions have been intrusted to a number of the bureaus. Thus, the Slave Trade Bureau at Zanzibar superintends the enforcement of the general anti-slavery act, which gives it a certain power of control over the

vessels furnished by the treaty powers for police duty in African waters. The Sanitary Councils of Constantinople and Alexandria exercise a direct administrative control over the various quarantine stations of the Levant and the Persian Gulf. The Mixed Commission of the Danube, the Caisse de la Dette, and the Macedonian Commission fulfill specific functions indicated by their local purposes. The Bureau of the American Republics has been charged with the duty of obtaining information for the governments of America which may be useful to them with regard to projected public works. The governing board of the bureau, moreover, fixes the date and program of future conferences. The International Patent Bureau at Berne, in behalf of a restricted union for this purpose, acts as a registry of trade-marks, which are thus made *ipso facto* valid in all the member states of the restricted union. The work of the Metric Bureau and of the bureaus of the scientific unions can be called administrative only in the sense that it contemplates the establishment of more adequate methods of investigation in the sciences concerned. The Metric Bureau, however, has a specific administrative duty of preserving the original standards of weights and measures, and of issuing to governments and associations duplicates of such standards carefully tested as to their accuracy.

More extensive and important administrative functions have been intrusted to the Sugar Commission. As already noted, it has the quasi-legislative function of preparing regulations for the customs administrations with a view of preventing the secret importation of bounty-fed sugars into the treaty states. The commission also decides upon requests for the admission of new members. In addition to these and other functions, the commission has the very important power of making certain determinations of fact on the basis of which the legislation of the treaty states must be modified under the provisions of the convention. Thus, the commission is instructed to ascertain if in any of the contracting states any sugar bounty is given; further, to determine the existence of bounties in noncontracting states and the amount of such bounties, with a view of applying the compensatory duties provided for in the treaty; and, finally, it may authorize the levy of a surcharge (not more than one

franc per hundred kilograms) by one treaty state against another, by whose sugar its markets are invaded to the injury of national production. The treaty not only fixes the maximum duties permissible on sugar imports, but it also establishes a general scale of counter-vailing duties to be levied against countries paying a bounty to their sugar producers. But all the determinations of fact upon which the levying of such duties is dependent are made the function of the Sugar Commission. It is difficult to define a function of this kind. It may perhaps be described as essentially judicial in that its main element is the determination of fact; but as it is a situation rather than an isolated fact which the commission is to determine, its power may in many cases be in its effect practically legislative, in that it may determine the duty of a certain administration to levy certain taxes or to make certain administrative arrangements. The functions attributed to the Sugar Commission constitute the greatest reach yet given to the powers of an international organ. The policy of granting such attributes was not discussed as a theoretical question, but the course of action was forced upon the treaty states by the situation of the sugar industry at the time when the treaty was concluded.

It is quite a general practice to give functions of a fiscal nature to the international bureaus and commissions. Sometimes accounts between different national administrations are to be settled. Thus, in the Postal Union, the bureau acts as a clearing house between the administrations and provides for the settlement of unsatisfied balances. In 1907, the amounts thus balanced by the Postal Bureau reached a total of 71,000,000 francs. In a similar way the bureau of the Railway Freight Union acts as a fiscal center for the collection of arrears and the settlement of balances between the administrations. The bureau for Industrial Property, which is charged with the special work of trade-mark registry for the restricted union, derives a direct income from this service, as it levies a fee of one hundred francs for the registry of a trade-mark and fifty francs for each additional trade-mark registered by the same proprietor at the same time. The proceeds from these fees are, after deduction of the expense of administration, divided among the members of the restricted union.

The governing board of the Bureau of American Republics deliberates on and fixes the annual budget of the bureau, which must be submitted to it by the director of that institution.

The financial support of the international bureaus and commissions is usually derived from direct contributions by the member states. In some instances, these contributions are made *pro rata*, according to the population of the member states (*e. g.*, American Union), or the expense may be borne in equal shares by all the members (*e. g.*, Sugar Union). In the Railway Union, the expenses are borne in proportion to the mileage of railways operated for international purposes in the various countries. Another method is to divide the member states into classes and to attribute to each class a certain number of units in the expenditure. Thus, the members of the Union for the Protection of Industrial Property are divided into six classes. Those belonging to the first class pay twenty-five units, those of the second class twenty units, and so on down to the sixth, which pay three units. The total annual expense of the union is divided by the total number of units, and the individual unit is then multiplied by the number associated with a particular class. A similar system is used in the International Institute of Agriculture. Here the states are given the choice as to which group they desire to range under. Stringent regulations covering default of payment are not always made, as the national self-respect of the member states is deemed a sufficient guaranty of payment. But in some cases a definite sanction is provided; in the Metric Union, for instance, the failure of a member state to pay its quota for three years in succession results in the striking of its name from the list of membership. It occasionally happens that the international unions receive special support from a particular nation, or from private sources. The American Union thus recently received the sum of \$750,000 from Mr. Carnegie for the purpose of erecting a suitable building as a home for its bureau; and upon the establishment of the International Institute of Agriculture, the King of Italy made a very substantial donation for the purpose of assisting in its maintenance.

In some of the international unions, methods have been established for the arbitration of controverted questions. It is evident

that a complete organization of internationalism would involve the creation of international tribunals in which controversies with respect to the various interests represented might be heard and decided. The general opposition which the principle of obligatory arbitration has encountered has thus far prevented any far-reaching action in this matter. Nevertheless, in a number of instances, arrangements for arbitral settlement of controversies have been concluded, which may indeed be looked upon as important precedents in the general movement of arbitration. When, at the Second Hague Conference, the general question of arbitration was being discussed in committee, it was prominently suggested and seriously considered that all the interests which had been publicly organized upon an international basis should be made subject to arbitration procedure. This fact very well illustrates the connection between the establishment of the international unions and the growth of a general feeling of international community. It was not merely an accidental suggestion that was made at The Hague, but rather the announcement of a principle which takes account of the most salient facts in the present organization of the civilized world. If certain international interests have arrived at a stage where their importance is recognized to the extent that separate international institutions have been created to guard over them and develop them, it may well be argued that these very interests constitute the most natural subjects for international arbitration. If their administration has been made international and to a definite extent common among all the nations, the decision of controverted questions with respect to them may safely be left to an international organ. Although the opposition to the general principle of arbitration was still so strong upon this occasion that the above suggestion was not enacted in the form of a treaty, it nevertheless embodied a sound principle of international policy.

Turning, now, to the specific arrangements for arbitration which have already been instituted, we note that in the Postal Union the bureau is instructed, upon demand of the parties, to give advice on controverted questions. Moreover, it is provided for that questions concerning the responsibility of any administration for registered mail matter and disputed interpretations of the convention shall be

submitted to arbitration upon the instance of one of the parties, the arbitrators in such case being two or three impartial governments. This provision is of great interest in that it represents the first enactment by public authority of the requirement of compulsory arbitration. Restricted as it is in its sphere of application, it nevertheless contains the complete principle of compulsory arbitration without abatement, and therefore may well be cited as a notable precedent in the future development of that method of procedure.

In the Railway Union the central bureau is charged, at the demand of the parties to the controversy, to pronounce arbitral sentences in disputes between different railway administrations. The suggestion made in 1904 that this power should be extended to controversies between railway administrations and private persons was not adopted by the conference. We have already seen that the determination of facts made by the Sugar Commission may be considered as quasi-judicial in their nature; but in addition to this duty, the commission is charged to give advice on disputed questions at the request of the governments or their delegates. The convention for the regulation of wireless telegraphy also provides for the arbitration of controversies by disinterested parties. Up to 1907, in the Postal Union, twelve cases had been submitted to the bureau for advisory arbitration, and three had been decided definitely by arbitrators.

The most common function of the international bureaus is that of furnishing reliable and adequate information concerning the particular interest in question. This is the main function of such bureaus as that of Industrial and Literary Property, the American Republics, Customs Tariffs, Labor, Sugar, Agriculture, Hygiene, and the Slave Trade (Brussels). It was as purely informational agencies that most of these bureaus came into being. This apparently innocent function was the entering wedge for other and more important international attributes, but even considered entirely by itself it is by no means of small importance. As a basis for national legislation, impartial and reliable information about the subject-matter involved, from the abundant sources of international experience, may best be furnished through the central service of the various bureaus. A direction toward greater unity and rationalness may

thus be imparted to national legislation, so that it may avoid the difficulties and drawbacks of local variations and local ignorance of the broader conditions of legislative problems. World-wide information is the only sound basis for a growing uniformity of law. The administrative side of governments will, however, find the informational function of the international bureaus of even more constant and general advantage. An administrative office is reluctant to send letters of inquiry to a foreign government. It may prefer, out of political modesty or for other reasons, to rely upon private sources of information — limited, partial, and in many ways inadequate. A thoroughly effective international service of information ought to justify itself primarily through active assistance to administrative offices in the various treaty states. The publications which have from time to time or at regular periods been issued by the international bureaus have in most cases been of unquestioned advantage to governments and to the public.

Closely allied to the function of furnishing general and specific information is that of preparing matters for the conferences of the unions, a function which is intrusted to many of the international bureaus. The bureau of the Institute of Agriculture, for instance, is instructed to propose measures for the protection of the common interests of agriculture. The bureau of the International Union of American Republics has been directed to make special investigations of topics proposed for action by the International American Conference. Such reports must be prepared at a sufficient time in advance of the conference in order that the individual governments may examine the matter with a view of instructing their delegates on the basis of the facts set forth. Preparatory work of this kind is done also by the Railway Bureau and by the bureau of the Sugar Union.

As we consider the totality of administrative activities centered in the international unions, we again note the extreme reluctance which nations have hitherto felt toward endowing these organs with positive powers. It is very common to exaggerate the functions of these international institutions. The International Railway Bureau, for instance, is sometimes portrayed as in a measure controlling the various European railway administrations. In order not to receive a

mistaken impression, it is necessary to remember that these institutions are primarily organs of information and communication. Other functions, as we have seen, have occasionally been granted, but they are thus far exceptional rather than normal. They point to future possibilities of development rather than to general present achievements. We need only look at the small budgets of these international institutions in order to understand how unprepared are the national governments to give them a powerful backing and support. On an annual allowance of from 60,000 to 125,000 francs, such as the Swiss bureaus enjoy, a complicated administration can not be developed. It is the more remarkable, however, what has actually been accomplished with such limited means. Notwithstanding the limitation in functions and resources, it is unquestioned that the international bureaus have succeeded in making for themselves a prominent place in the modern civilized world, a place which they owe partly to the circumspection and wisdom with which their affairs have been managed; partly, however, also to the future importance which the intelligent public of the civilized world is beginning to attribute to the international organizations which these organs represent.

PAUL S. REINSON.

CONCERNING THE INTERPRETATION OF TREATIES¹

IN GENERAL

The interpretation of treaties is a part of the procedure of carrying out or realizing the act of contracting. This work would not be necessary if agreements between states were bare expressions of international good-will, like the arrangements of friendly monarchs to interchange visits. Because, however, treaties are deemed capable of realization and performance, the process is essential.²

The method of interpretation consists in finding out the connection made by the parties to an agreement, between the terms of their contract and the objects to which it is to be applied. This involves two steps. One is to ascertain what has been called the "standard of interpretation;" that is, the sense in which various terms are employed. The other is to learn what are the sources of interpretation; this is, to find out where one may turn for evidence of that sense.

As various standards of interpretation are available, it is obviously necessary to ascertain which one the contracting states may have adopted. A treaty may, for example, prohibit the citizens of one state from fishing within a specified distance of the bays of another state. To ascertain in what waters fishing is not permitted it is necessary to determine in what sense the term "bays" was employed; whether in the literal sense, according to the definition given in approved dictionaries, or in a sense, if there be one, peculiar to international law, or in one known only to the parties to the agreement. While contracting states may avail themselves of any standard of interpretation convenient to their purpose, no party to a

¹ This article embodies a small section of a treatise on International Law which is in preparation for publication by Messrs. Little, Brown & Company, Boston.

² See Wigmore, Evidence, IV, 3470.

treaty can rightly invoke one known only to itself.³ It is the signification which the several parties to an agreement may be regarded as having attached to their words which is alone the subject of investigation.⁴

In order to ascertain the sense in which a word or clause is employed in a treaty it becomes necessary to search for sources of interpretation. For this purpose recourse may be had to extrinsic circumstances. The effort of search is not fettered by many prohibitive rules, which the common law, for example, applies when the same undertaking concerns the contracts of individual men. As Professor Westlake says:

The important point is to get at the real intention of the parties, and that inquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence, but is not generally accepted in the civilized world.⁵

It is important to bear in mind that the final purpose of seeking to learn the intentions of contracting states is to ascertain the sense in which terms are employed. It is the contract which is the subject of interpretation, not the volition of the parties thereto. It may be clearly established that while certain expressions are used in a par-

³ The common law does not permit such latitude in the interpretation of legal acts. The rule prohibiting reliance on a sense "disturbing a clear meaning" of a term is an illustration. See Wigmore, *Evidence*, IV, 3476.

⁴ "When a treaty is executed in more than one language, each language being that of a contracting party, each document, so signed and attested, is to be regarded as an original, and the sense of the treaty is to be drawn from them collectively." Moore, *Int. L. Dig.*, V, 252, citing *United States v. Arredondo*, 6 Pet. 691, 710; also Mr. Hay, Secretary of State, to Mr. Beaupré, No. 331, Nov. 16, 1900, *MS. Inst. Columbia*, XIX, 123.

⁵ *Int. Law*, I, 282.

"Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words — that is, their associations with things." Wigmore, *Evidence*, IV, 3499.

Among the systems of rules formulated for the interpretation of treaties, those of Vattel, Book II, Chap. XVII; Phillimore, II, 94-125; Hall (5th ed.), 335-343; and Woolsey, 173-174, have been frequently cited.

ticular sense, a contracting state, notwithstanding that fact, has given its consent with the desire and intention to accomplish a purpose or secure a right inconsistent therewith. Such an intention or volition is not decisive of the rights of the parties under their agreement. Says Professor Wigmore:

Interpretation as a legal process is concerned with the *sense* of the word used, and not with the *will* to use that particular word.⁶

The situation is like that of two men, A and B, who may have agreed to use a particular code in their contracts by telegram. A, in response to an offer by B, telegraphed a word which according to the code signified his acceptance. A may have supposed that by so doing he was merely asking for a better price. The fact that he did not intend to accept the offer, but that he believed the word which he telegraphed signified something other than acceptance, is immaterial. Not by consulting A's intention or volition, but by reference to the code, are the rights of the parties to be determined; for the fact has been established that according to mutual understanding the code should be the standard of interpretation.

The demands which a state may make upon another at the time of entering into their contract, the facts known to their plenipotentiaries, the correspondence or interchange of views leading up to and forming a part of the final negotiations, may all be important. Whatever be its form, evidence of the signification attached by the parties to the terms of their compact should not be excluded from the consideration of a tribunal intrusted with the duty of interpretation. When the fact is established that the parties adopted a particular standard of interpretation — that they used expressions with a particular signification of their own choice — it is immaterial how widely that signification may differ from any other.⁷

⁶ Evidence, IV, 3471. See also Scott's Cases, Int. L., 426, note by the editor.

⁷ The treaty between the United States and Switzerland of November 25, 1850, provided for most-favored-nation treatment "in the importation, exportation, and transit" of their respective products. In 1898 the Swiss Government claimed that by virtue of Articles VIII, IX, X, and XII it was entitled to demand for Swiss importations into the United States such concessions as were accorded French importations under a reciprocity agreement between the United States

An instructive case was decided by the umpire of the British-Venezuelan Commission, established in accordance with the terms of the protocol of February 13, 1903, providing for the arbitration of British claims before a mixed commission. Article III of that instrument declared that

The Venezuelan Government admit their liability in cases where the claim is for injury to or wrongful seizure of property, and consequently the questions which the mixed commission will have to decide in such

and France of May 28, 1898. (Mr. Pioda, Swiss Minister, to Mr. Day, Secretary of State, June 29, 1898, U. S. For. Rel., 1899, 740). Mr. Day, Secretary of State, pointed out "that a reciprocity treaty is a bargain and not a favor, and that it therefore does not come within the scope of the most-favored-nation clause." (*Id.*, 740.) It was urged, however, by the Swiss Minister that according to the understanding of the signatory parties in 1850, expressly shown by the American plenipotentiary, Mr. Mann, who negotiated the treaty, that out of friendly regard for Switzerland no limitation should be attached to the most-favored-nation clause. (*Id.*, 742.) Mr. Hay, Secretary of State, in a note to the Swiss Minister, November 21, 1898, admitted that the American Minister who conducted the negotiations agreed to the interpretation advanced by Switzerland, that the treaty was ratified in both countries with the distinct understanding that it should apply to reciprocity treaties. He, therefore, concluded "under these circumstances we believe it to be our duty to acknowledge the equity of the reclamation presented by your Government. Both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect." (*Id.*, 747-748.)

In *Geofroy v. Riggs*, 133 U. S. 258, at 271, the court says: "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended." See also *United States v. Payne*, 8 Fed. Rep. 883, 892; *Strother v. Lucas*, 12 Pet. 410, 436; *United States v. Arredondo*, 6 Pet. 691, 710, 741.

According to the convention of January 24, 1903, between the United States and Great Britain for the settlement of the Alaskan boundary dispute before a joint tribunal, it was agreed that the court should consider certain articles of the Russian-British treaty of February 28/16, 1825, and of the Russian-American treaty of March 30/18, 1867, and that "the tribunal shall also take into consideration any action of the several governments or of their respective representatives preliminary or subsequent to the conclusion of said treaties so far as the same tends to show the original and effective understanding of the parties in respect to the limits of their several territorial jurisdictions under and by

cases will only be: (a) Whether the injury took place and whether the seizure was wrongful, and (b) if so, what amount of compensation is due.⁸

In behalf of Great Britain it was contended that by its agreement Venezuela had assumed liability for injury to or wrongful seizure of property respectively committed or taken by forces of unsuccessful rebels. Venezuela, however, asserted that liability was admitted only for such claims as were "just" according to international law, and that there was no assumption of liability for acts of revolution-

virtue of the provisions of said treaties." (U. S. For. Rel., 1903, 488, 491.) It was further agreed that seven specified questions as to the interpretation of the Russian-British treaty should be answered and decided by the tribunal. In the course of his instructive opinion on the fifth question Lord Alverstone, the president of the tribunal, said: "It is in my opinion correctly pointed out, on behalf of the United States, that the word 'coast' is an ambiguous term, and may be used in two, possibly more than two, senses. I think, therefore, we are not only entitled, but bound to ascertain as far as we can from the facts which were before the negotiators the sense in which they used the word 'coast' in the treaty. Before considering this latter view of the case, it is desirable to ascertain as far as possible from the treaty itself what it means, and what can be gathered from the language of the treaty alone. * * * This consideration, however, is not sufficient to solve the question; it still leaves open the interpretation of the word 'coast' to which the mountains were to be parallel." (Proceedings of the Alaskan Boundary Tribunal, I, Part I, 36, 37, 39.) See the opinions of the American members of the tribunal, Messrs. Root, Lodge, and Turner (*id.*, I, Part I, 43, 48-49); opinion of Sir. L. Jetté (*id.*, I, Part I, 65-79); Rules of Construction and Interpretation presented in argument of the United States (*id.*, V, Part I, 6-11); evidence to be considered in the American case (*id.*, V, Part I, 11). It is said in the United States counter-case that "the United States asserts that the intention of the parties to the treaty is vital to its true interpretation; that such intention between nations is the very essence of the agreement; and that any material variance from the intention must give place to an interpretation in accordance with it." (*Id.*, IV, Part I, 40.) In the counter-case of Great Britain it is said that "the function of the tribunal is to interpret the articles of the convention by ascertaining the intention and meaning thereof, and not to recast it. Any considerations showing that the words of the treaty must have been intended to bear a particular meaning, being a meaning which they are in themselves capable of bearing, may, of course, be legitimately presented." (*Id.*, IV, Part III, 6.) See also argument of Great Britain (*id.*, V, Part II, 37); oral argument of Mr. Taylor (*id.*, VII, 578-579); Mr. Robinson (*id.*, VII, 501-502, 506-507, 514-516); Mr. Watson (*id.*, VI, 363-364); Judge Dickinson (*id.*, VII, 731-732).

⁸Ralston's Reports, Venezuelan Arbitrations of 1903, 292.

ary troops without proof of any fault on the part of the titular government. In support of the British interpretation it was urged that the circumstances attending the signing of the protocol, particularly the fact that Venezuela entered into the arbitration agreement as a condition precedent to the lifting of the blockade of its ports by Great Britain and its allies, proved conclusively that the words of the compact should be given their broadest colloquial sense, and that therefore the admitted liability should cover acts of revolutionary as well as of governmental forces. It was not denied by the umpire, Mr. Plumley, that it might have been possible for the contracting states to use the words according to the British contention; nor that if such fact were established any rule of law would require him to disregard the sense which the parties themselves had attached to the terms of their own agreement.

In his search for sources of interpretation the umpire made a careful review of the circumstances leading up to the agreement. The diplomatic correspondence between the two Governments was rigidly examined. His conclusion was that "President Castro understood he was admitting the liability of his Government only for such claims as were 'just;' that Mr. Bowen (representing Venezuela) understood he was submitting to arbitration only the matters contained in the ultimatum of each of the allied powers;" that in none of the correspondence or conferences of the allies with Venezuela was there "a sentence, a phrase, or a word directly or indirectly making claim to indemnity for losses suffered through acts of insurgents or directly or indirectly making allusion thereto;" that while the British Government thought the terms of the agreement broad enough to include such claims, it could not invoke a construction which Venezuela neither knew of nor had reason to know of, and to which it therefore had never assented. "Hence the umpire holds that Venezuela did not specifically agree in the protocols to be subject to indemnities for the acts of insurgents."⁹

⁹ The Aroa Mines (Ralston's Reports, Venezuelan Arbitrations of 1903, 344, 350, 383). See also the Crossman Case (*id.*, 298) and the De Lemos Case (*id.*, 302), both also decided by the umpire of the British-Venezuelan Commission.

Identical expressions in the Italian-Venezuelan protocol of the same date were

Declarations made by the negotiators of a treaty at the time of exchange of ratifications, or subsequent thereto, concerning the sense

given like interpretation by Mr. Ralston, umpire of the Italian-Venezuelan Commission, in a well-considered and instructive opinion in the Sambiaggio Case (*id.*, 666, 679). But see the interpretation of the German-Venezuelan protocol by the umpire, General Duffield, in the Kummerow Case (*id.*, 526, 549); that of the Spanish-Venezuelan protocol by the umpire, Mr. Gutierrez-Otero, in the Padrón Case (*id.*, 923), and in the Mena Case (*id.*, 931).

Note also the following cases involving the interpretation of international agreements:

Case of Joseph Chourreau before the French and American Claims Commission, under the convention between the United States and France of January 15, 1880, and the decision of Mr. Fellinghuysen, Secretary of State, as to the interpretation of the terms "territory" and "territorial jurisdiction" employed in the convention. (Moore, *Int. Arbitrations*, II, 1145, 1146, citing H. Ex. Doc. 235, 48th Cong., 2 sess., 16; also Boutwell's Report, 134.)

Opinion of the umpire, Sir Frederick W. A. Bruce, in the Capitation Tax Case, as to the power of the commission under the convention between the United States and Colombia of February 10, 1864, to determine whether a certain tax imposed by Panama was in violation of Articles II, III, and XXXV of the treaty between the United States and New Granada of December 12, 1846. (Moore, *Int. Arbitrations*, II, 1412.)

Opinion of Mr. Alexander S. Johnson, American commissioner of the joint commission under the British-American treaty of July 1, 1863, in the case of the Puget's Sound Agricultural Company concerning the interpretation of Article IV, treaty of June 15, 1846, between the United States and Great Britain. (Moore, *Int. Arbitrations*, I, 266.)

Sentence and award of Mr. C. A. Logan, arbitrator in the matter of the Chilean-Peruvian Alliance of December 5, 1865, under the Chilean-Peruvian protocol of March 2, 1874. (Moore, *Int. Arbitrations*, II, 2086.)

Opinion of Mr. John Little, commissioner in the case of William H. Aspinwall, executor of G. G. Howland and others, v. Venezuela, No. 18, United States and Venezuelan Claims Commission under convention of December 5, 1885, as to whether bonds of Venezuela were included among the claims to be submitted to arbitration before the commission. (Moore, *Int. Arbitrations*, IV, 3616.) Also opinion of Mr. John V. L. Findlay, commissioner (*id.*, 3642).

Decision of Mr. John Little, commissioner of the United States and Venezuelan Claims Commission, under the convention between the United States and Venezuela of December 5, 1885, as to the character of the proceedings under the treaty. (Moore, *Int. Arbitrations*, II, 1677.)

In the course of an elaborate opinion in the Manica arbitration between Great Britain and Portugal, under the *Acte de Compromis* of January 7, 1895, the arbitrator, Signor Paul Honoré Vigliani, said: "In our case the rule of legal interpretation, according to which the expressions made use of in a contract must be taken in the sense most in accordance with the intentions of the parties who

in which it was understood that certain terms were employed are of value as sources of interpretation and should not be disregarded.¹⁰

have arranged it and the most favorable to the aim of the contract, obliges us to give to the word 'plateau' the broadest possible signification—that is to say, to require only the minimum normal altitude—so as to be able to affirm its existence as far as the Save, as the high contracting parties had supposed, and so as thus to render possible the application of the text of Article II of the treaty." (Moore, *Int. Arbitrations*, V, Appendix, 4985, 5011.)

In the case of *Marryatt v. Wilson*, 1 Bosan. & Puller, 435, 436, Chief Justice Eyre said: "We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A and B, or happen to be two independent states." Mr. Morse, the arbitrator in the *Van Bokkelen* Case, says that "*Marryatt v. Wilson* is strong authority for the proposition that the municipal tribunals of the country may not nullify the purpose and effect of treaty language by imposing upon it a cramped, narrow, and forced construction." (Moore, *Int. Arbitrations*, II, 1840.)

Opinion of the arbitrator, Mr. Alexander Porter Morse, in the case of *Charles Adrian Van Bokkelen*, under the protocol between the United States and Haiti of May 24, 1888, concerning the interpretation of the treaty between those States November 3, 1864. (Moore, *Int. Arbitrations*, II, 1813.)

Napier et al v. The Duke of Richmond, Journ. du. Pal., year 1839, II, 2, cited in the *Van Bokkelen* Case. (Moore, *Int. Arbitrations*, II, 1830.)

Case of *Lewis S. Hargous* before the United States and Mexican Claims Commission: Convention of April 11, 1839, concerning the scope of the powers of the commission under the convention, and the nature of claims for which liability was assumed. (Moore, *Int. Arbitrations*, II, 1267.)

Note the language of His Imperial Majesty the Emperor of Russia, interpreting Article I of the treaty of Ghent of December 24, 1814, as arbitrator under Article V of the convention between the United States and Great Britain, October 20, 1818; also the reasons given for the method of interpretation employed. (Moore, *Int. Arbitrations*, I, 359, 360.)

See also *Goetze v. United States*, 103 Fed. Rep. 72; *Schultze v. Schultze*, 144 Ill. 290; *Adams v. Akerlund*, 168 Ill. 632; *Tucker v. Alexandroff*, 183 U. S. 424.

¹⁰ Prior to the exchange of ratifications of the Clayton-Bulwer treaty of 1850, Sir Henry Bulwer, the British Minister, made a declaration at the Department of State that his Government did not understand the engagements of that convention to apply to the British settlement at Honduras, or to its dependencies. Mr. Clayton, Secretary of State, in reply acknowledged that he understood British Honduras was not embraced in the treaty, at the same time declining to deny or affirm British title to the territory in question. The Secretary adverted to the fact that he had been informed by the Chairman of the Senate Committee on Foreign Relations, Mr. W. R. King, "that the Senate perfectly understood that the treaty did not include British Honduras." (H. Ex. Doc., 34th Cong.,

As the sense which contracting states have attached to the terms of their agreement is controlling in the estimation of those to whom are entrusted the duty of interpreting treaties, as all circumstances probative of that fact are admissible for the purpose of its establishment, the formation of rules of interpretation can hardly serve a useful purpose. Times when proof is not to be had are rare. Even

1 Sess., 119; Moore, *Int. Law Dig.*, III, 136-137.) Lord Clarendon, in the course of a note to Mr. Buchanan, May 2, 1854, said: "It was never in the contemplation of Her Majesty's Government, nor in that of the Government of the United States, that the treaty of 1850 should interfere in any way with Her Majesty's settlement at Belize or its dependencies." (*Brit. & For. St. Pap.*, XLVI, 267; Moore, *Int. Law Dig.*, III, 138.) The statements of Sir Henry Bulwer and Messrs. Clayton and King were clearly evidence of the fact asserted. For that purpose, and for that alone, they were entitled to consideration. It must be obvious that these gentlemen did not possess the power to amend a treaty between the United States and Great Britain. Owing, however, to their official positions they necessarily had precise knowledge of the fact in question. The evidential quality of their declarations in regard to it could not be ignored.

The reason why declarations of intention could not be given in aid of interpretation of the documents at common law, save in certain exceptional circumstances, was that they were considered dangerous for a jury who, not being expert in such matters, might attach to them too great weight. This objection is not applicable to the interpretation of agreements between states. Declarations of their plenipotentiaries, in so far as they indicate the sense in which the terms of a treaty are employed, are valuable not merely because they are enlightening, but also because they may be safely entrusted to the consideration of judges of international tribunals, or to ministers of state.

See also Mr. Marcy, Secretary of State, to Mr. Buchanan, December 30, 1853. *Correspondence in Relation to the Proposed Interoceanic Canal* (Washington, 1885), 247. Moore, *Int. Law Dig.*, III, 137.

See also Lord Granville to Mr. West, Minister at Washington, December 30, 1882, *U. S. For. Rel.*, 1883, 484; Memorandum of Mr. Olney, Secretary of State, 1896, on the Clayton-Bulwer treaty, Moore, *Int. Law Dig.*, III, 203, 207; Crandall, *Treaties, Their Making and Enforcement*, 226-227; *The Diamond Rings*, 183 *U. S.* 176.

A commission under Article V of the Jay treaty of November 19, 1794, between the United States and Great Britain was established to decide what river was the River St. Croix intended by the treaty of 1782-1783, forming a part of the boundary between the United States and New Brunswick. There was at that time no river known as the St. Croix. The depositions of John Adams and John Jay, surviving negotiators of the treaty of 1782-1783, as well as a letter of Benjamin Franklin, also a negotiator of that treaty, were received in evidence as declarations concerning the original negotiations and the agreement itself. (Moore, *Int. Arbitrations*, I, 18-22.)

when it is wholly lacking it is dangerous to impute to a state assent to a particular significance of the words of a treaty. Where various inferences may be reasonably deduced from the conduct of the signatory parties under given circumstances, it is obviously unjust to assert as a rule that any one of them should be controlling. It is only the single reasonable inference which must be deduced from the conduct of the contracting parties which can be safely trusted. Circumstances compelling such an inference, however, sometimes exist. If, for example, it should appear that it would have been unreasonable, if not inconceivable, for a contracting state to agree to any but a particular signification of certain terms employed the necessary inference that such state had acted reasonably, if not wisely, will prevail, although such a signification may be at variance with the literal sense of the words of the compact.¹¹

¹¹ In his award in the Reserved Fisheries Arbitration under Article I of the reciprocity treaty between the United States and Great Britain of June 5, 1854, the umpire, Mr. John Hamilton Gray, said: "But might it not also be assumed that where a country had, by a long series of public documents, legislative enactments, grants, and proclamations, defined certain waters to be rivers, or spoken of them as such, or defined where the mouths of certain rivers were, and another country subsequently entered into a treaty with the former respecting those very waters, and used the same terms, without specifically assigning to them a different meaning, nay, further stipulated that the treaty should not take effect in the localities where those waters were, until confirmed by the local authorities, might it not be well assumed that the definitions previously used, and adopted, would be mutually binding in interpreting the treaty, and that the two countries had consented to use the terms in the sense in which each had before treated them in their public instruments, and to apply them as they had been previously applied in the localities where used? I think it might." (Moore, *Int. Arbitrations*, I, 449, 458.)

See the opinion of Mr. Pinkney, commissioner, July 1, 1797, case of the *Betsey*, Furlong, master; commission under Article VII, treaty between the United States and Great Britain, November 19, 1794, as to whether the commission, according to the treaty establishing it, was bound by the decision of the Lords Commissioners of Appeal affirming a sentence of condemnation by the Vice-Admiralty of Bermuda. Moore, *Int. Arbitrations*, III, 3180. In the course of his opinion Mr. Pinkney said: "Are we, then, to uphold an interpretation of this instrument which is not only unauthorized by its language, but is unsuitable to the subject of it, and at variance with the undoubted rights of one party and the duties of the other? What Great Britain could not properly demand, we are to *suppose* she did demand, what the United States ought to have insisted upon,

Again, it is usually held that if the general purposes of a treaty conflict with the literal signification of any of its terms, the former should prevail.¹² Frequently, in such cases, there is evidence that at least one of the parties is far from assenting to the literal sense of the expressions employed. The situation thus becomes one where the fact of assent is capable of proof.

When the sense in which the parties have used the terms of their agreement is ascertained, the legal effect of the terms employed is a problem for the solution of which the courts turn to the law of nations. Thus, for example, when an umpire concludes that the "claims" for which a contracting state assumes liability in a protocol of agreement refer to those which are just according to inter-

we are to *suppose* they abandoned, and this is to be done not only without evidence, but in direct contradiction to the declarations of the parties." (*Id.*, 3203-3204.)

See opinion of Sir Edward Thornton, umpire in the case of Don Rafael Aguirre v. The United States, No. 131: Convention between the United States and Mexico of July 4, 1868, as to the scope of the release given the United States by Mexico in Article II of the Gadsden treaty of December 30, 1853. (Moore, *Int. Arbitrations*, III, 2444.)

See also Mr. Ralston, umpire in the Sambiaggio Case, Italian-Venezuelan Claims Commission, under protocol of February 13, 1903, Ralston's Reports, 666, 688.

See the opinion of Pinkney, commissioner, case of the *Betsey*, Furlong, master, commission under Article VII, treaty between the United States and Great Britain of November 19, 1794, concerning the power of the arbitrators under the treaty to determine their own jurisdiction. (Moore, *Int. Arbitrations*, III, 2291; also opinion of the same commissioner in the case of the *Sally*, Hayes, master, *id.*, III, 2306.)

¹² Note the respective contentions of the United States and Great Britain concerning Article I, treaty of June 15, 1846, providing for the San Juan water boundary, and the award of the arbitrator, William I, German Emperor, under Articles XXXIV-XLII, treaty of May 8, 1871. (Moore, *Int. Arbitrations*, I, 213-214, 219-221, 229-231.) Crandall, *Treaties, Their Making and Enforcement*, 224.

See also the frequently cited case of the interpretation of Article IX of the treaty of Utrecht of 1713, between Great Britain and France, providing for the destruction of the port and fortifications at Dunkirk, given by Phillimore, II, § 73, and Hall (5th ed.), 339.

Note also interpretation of Article I of the convention of September 10, 1857, between the United States and New Granada by Mr. Upham, umpire of the United States and New Granada Joint Commission, as to the presentation of and liability for riot claims. (Moore, *Int. Arbitrations*, II, 1375-1378.)

national law, it then becomes his duty to ascertain what claims are valid according to that law.¹³

THE MOST-FAVORED-NATION CLAUSE

It is frequently provided in treaties that the citizens or subjects of the contracting states may enjoy the privileges accorded by either party to those of the most-favored nation.¹⁴

Writes Professor Moore:

The general design of the most-favored-nation clauses, as they are expressed in various treaties, is to establish the principle of equality of treatment. * * * The test of whether this principle is violated by the concession of advantages to a particular nation, is not the form in which such concession is made, but the condition on which it is granted. The question is whether it is given for a price, and whether this price is in the nature of a substantial equivalent, and not of a mere evasion.¹⁵

The United States has always taken the stand that reciprocal commercial concessions are not gratuitous privileges, but given for a valuable consideration, and therefore not within the scope of the most-favored-nation clause.¹⁶

¹³ Mr. Ralston, umpire in Sambiaggio Case, Italian-Venezuelan Claims Commission, 1903, and Plumley, umpire in Aroa Mines Case, British-Venezuelan Claims Commission, 1903. Ralston's Reports, 679 and 344, respectively.

¹⁴ See, for example, Article I, treaty between the United States and Japan, November 22, 1894; Treaties in Force, 1904, 474.

¹⁵ Hon. J. B. Moore, "Opinion Upon the Question Whether Congress Can Pass a Special Tariff Act for Cuba, Without Violating the Most-Favored-Nation Clause in Treaties with Other Countries." January 14, 1902, p. 4, citing opinion of Mr. Olney, Attorney-General, 21 Op. Attys.-Gen., 80, 82, 83.

¹⁶ See correspondence between Mr. Adams, Secretary of State, and the French Minister, Mr. Hyde de Neuville, in the course of which Mr. Adams, in a communication December 23, 1817, said: "The eighth article of the treaty of cession stipulates that the ships of France shall be treated upon the footing of the most-favored nations in the ports of the ceded territory; but it does not say, and can not be understood to mean, that France should enjoy as a free gift that which is conceded to other nations for a full equivalent." Am. St. Papers, For. Rel., V, 152, 153, 163, 165, 171, 180, 186, 192.

See also Mr. Sherman, Secretary of State, to Mr. Buchanan, Minister to Argentine Republic, No. 303, January 11, 1898, and No. 336, April 9, 1898, MS. Inst. Arg. Rep., XVII, 306, 337; Moore Int. Law Dig., V, 277; Mr. Adee, Acting Secretary of State, to Russian Chargé d'Affaires *ad interim*, July 30, 1895, U. S. For. Rel., 1895, II, 1121; Moore, Int. Law Dig., V, 276. For further diplomatic

Great Britain, however, takes the position that concessions granted for a consideration may properly be claimed under the most-favored-nation clause.¹⁷ To avoid dangers of construction the application of the clause is sometimes expressly restricted as in the treaty between Great Britain and Uruguay of July 15, 1899,¹⁸ and in Article II of the Franco-German Treaty of Frankfurt of May 10, 1871.¹⁹

Political relations between two states may be of a kind to afford in themselves a fair basis for commercial concessions, which other states could not justly claim the right to enjoy by reason of the most-favored-nation clause. Such relations were partly accountable for the terms of the treaty between the United States and Hawaii of January 30, 1875.²⁰ The relations between the United States and Cuba are of such a character as to enable the former to enact a special tariff act for the latter without violating the most-favored-nation clause in its treaties with other countries.²¹

correspondence indicating the view of the United States, see documents contained in Moore, *Int. Law Dig.*, V, 257-288.

See also *Bartram v. Robertson*, 122 U. S. 116; *Whitney v. Robertson*, 124 U. S. 190; *Thingvall Line v. United States*, 24 Ct. Cl. 255.

See F. de Martens, *Droit International*, II, 322; Ernest Lehr, in *Rev. Gén. Dr. Int. Pub.*, year 1893, 315; *Information Respecting Reciprocity and the Existing Treaties*, by Hon. John A. Kasson, Washington, 1901; Joseph Rogers Herod, *Favored Nation Treatment*, 1901.

¹⁷ See Earl Granville, Secretary of State for Foreign Affairs, to Mr. West, British Minister at Washington, February 12, 1885, Blue Book, Commercial No. 4 (1885), 21-22, Moore, *Int. Law Dig.*, V, 270; Mr. Frelinghuysen, Secretary of State, to Mr. Bingham, Minister to Japan, June 11, 1884, *MS. Inst. Japan*, III, 253, Moore, *Int. Law Dig.*, V, 267, *nota*.

See also Sir Thomas Barclay, in "The Effect of the Most-Favoured-Nation Clause in Treaties," a paper read before the Portland Conference of the International Law Association, 1907, *Yale Law Journ.*, XVII, 26.

¹⁸ N. R. G., 2 ser., XXX, 266.

¹⁹ N. R. G., XIX, 688.

²⁰ This fact was recognized by Germany. In a separate article of its treaty with Hawaii of September 19, 1879, it was declared that "certain relations of proximity and other considerations" rendered important the negotiation of the American-Hawaiian compact, the provisions of which should not be invoked by the contracting parties. See Moore, *Int. Law Dig.*, V, 263-267, concerning diplomatic discussions resulting from the American-Hawaiian treaty. See also *Bartram v. Robertson*, 122 U. S. 116; *Whitney v. Robertson*, 21 Fed. Rep. 566.

²¹ "We have in the case of the United States and Cuba a remarkable example

A law providing for the levying of a lower rate of tonnage dues on vessels sailing from certain foreign places, such as North America, Central America, the West Indies, the Bahamas, the Bermudas, the Hawaiian Islands, or Newfoundland, may well be protested against by a state whose ports are outside of the specified area, and whose commerce with the legislating state is, by treaty, to be accorded the most-favored-nation treatment. The fact that such discrimination is geographical rather than national, embracing any state in the specified zone, does not satisfy the objection that the states on whose vessels the lighter dues are levied are more favored in respect to commerce than those whose vessels must pay a greater sum.²²

The payment by a state of a bounty on the exportation of an article produced or manufactured in its territory can not on principle justify another state into which such article is imported in imposing an additional duty, where the commerce between such states is by agreement to receive most-favored-nation treatment.²³ "It is

of those special and exceptional relations, physical and political, which, not being estimable simply in terms of commerce, are universally recognized as the surest foundation for the mutual exchange of exclusive advantages; relations, moreover, which are expressed in valid public acts, whose legal effect all nations have acknowledged." Hon. J. B. Moore, in opinion cited, 14.

See also Mr. Bayard, Secretary of State, to Mr. Robinson, consul at Tamatave, No. 129, May 12, 1886, 117 MS. Desp. to Consuls, 571. Moore, *Int. Law Dig.*, V, 313.

²² See Report of Mr. Bayard, Secretary of State, to the President, January 14, 1889, concerning operation of act of Congress of June 26, 1884, and June 19, 1886. H. Ex. Doc. 74, 50th Cong., 2d Sess.; Moore, *Int. Law Dig.*, V, 288.

See correspondence between the United States and Colombia as to whether a proclamation of President Harrison of March 15, 1892, suspending the free admission into the United States of certain articles produced in or exported from Colombia, in accordance with section 3 of the McKinley Act of October 1, 1890, should be regarded as a violation of the treaty between the United States and New Granada of December 12, 1846, U. S. For. Rel., 1894, Append. I, 451-503; U. S. For. Rel., 1894, 198-199.

²³ See German Memorandum on Additional Duty on German Sugar, July 16, 1894; U. S. For. Rel., 1894, 234; Report of Mr. Gresham, Secretary of State, to the President, October 12, 1894, U. S. For. Rel., 1894, 236.

See also President Cleveland, Annual Message, December 3, 1894, U. S. For. Rel., 1894, ix-x; Mr. Olney, Attorney-General, November 13, 1894, 21 Op. Attys.-Gen., 80, 82; Mr. Sherman, Secretary of State, to the German Chargé d'Affaires

understood, when treaties against discriminating duties are made, that governments reserve the right to favor (by duties or by bounties) their own domestic production or manufacture."²⁴

The most-favored-nation clause is frequently employed to describe the scope of privileges to be accorded consular officers of the contracting states. It has been held that this clause is applicable to any rights and privileges specifically conferred upon such officers by the provisions of particular conventions, such as those contained in Article IX of the treaty between the United States and the Argentine Republic of July 27, 1853,²⁵ giving consuls the right to intervene in the administration of the intestate estates of their deceased countrymen.²⁶

The most-favored-nation clause is not regarded as applicable to many particular provisions of agreements, such as to engagements

ad interim, September 22, 1897, U. S. For. Rel., 1897, 178; Mr. Hengelmüller, Austro-Hungarian Minister at Washington, to Mr. Sherman, April 13, 1897, U. S. For. Rel., 1897, 22; act of Congress of July 24, 1897 (30 Stat. at L. 205); *Downs v. United States*, 187 U. S. 496. An excellent abstract of the correspondence between Great Britain and Russia "Respecting the Interpretation of the Most-Favoured-Nation Clause in Connection with Countervailing Duties on Bounty-Fed Sugar." (Parliamentary Papers, Commercial No. 1 (1903), is given in Moore, *Int. Law Dig.*, V, 307-309.

²⁴ Mr. Gresham, Secretary of State, in Report cited U. S. For. Rel., 1894, 236, 239.

²⁵ *Treaties in Force*, 1904, 27.

²⁶ *In re Wyman*, 191 Mass. 276; *In re Fattosini's Estate*, 33 N. Y. Misc. 18.

See also Mr. Olney, Secretary of State, to Mr. Dupuy de Lôme, Spanish Minister, September 26, 1895, and October 11, 1895, claiming by virtue of the most-favored-nation clause of Article XIX of the treaty between the United States and Spain, of October 27, 1795, the benefit of Article IX of the Spanish-German consular treaty of February 22, 1870. U. S. For. Rel., 1895, II, 1210 and 1212; Mr. Speed, Attorney-General, June 26, 1866, 11 Op. Attys.-Gen. 508.

It is stated in the Regulations of the Consular Service of the United States, 1896, paragraph 78, that in those countries, which are specified, with whom the United States has entered into consular treaties containing the most-favored nation clause, "consuls of the United States are entitled to claim as full rights and privileges as have been granted to consuls of other nations."

But see Mr. Buchanan, Secretary of State, to the Chevalier Hülseemann, May 18, 1846, MS. Notes to German States, VI, 130; Moore *Int. Law Dig.*, V, 261. Also note, Mr. Hay, Secretary of State, to Mr. Wolcott, U. S. S., February 3, 1900, 242, MS. Dom. Let., 522; Moore, *Int. Law Dig.*, V, 123.

of extradition,²⁷ or to an agreement concerning what should be regarded as contraband,²⁸ or to the provisions of a pilot law of the United States excepting from pilotage American coastwise vessels.²⁹

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²⁷ "Engagements of extradition, whether of fugitives from justice or from service, stand in each case on particular stipulations of treaty, and are not to be inferred from the 'favoured-nation' clause in treaties." Moore, *Int. Law Dig.*, V, 311, citing Cushing, Attorney-General, October 14, 1853, 6 *Op. Attys-Gen.* 148, 156.

²⁸ *The James and William*, 37 Ct. Cl. 303.

²⁹ *Olsen v. Smith* (1904), 195 U. S. 332, 344.

THE INTERCANTONAL LAW OF SWITZERLAND (SWISS INTERSTATE LAW)

I. CHARACTER AND MEANING OF INTERSTATE LAW¹

Interstate law is the law governing the relations between the members of a confederation of states with each other, in so far as these are opposed to each other as states. It is distinguished from international law because its subjects are not sovereigns, but belong to a governed body of a superordinate commonwealth. As opposed to federal state law it is characterized by having for its object not relations of supremacy and subordination between the federation and its members, but relations of coordination between the members of the federal state. Interstate law is an intermediary conception between the law of confederations and the law of nations.

Interstate law is above all of importance for confederations of states — that is, in the contemporary political world, only for federal states. And even in federal states this law is only so far to be met with, where the federal constitution has not deprived the states of their character of state and of their capacity for interstate intercourse. As the aim of federal states is precisely to put a strong, uniform, national organization in the place of the imperfect inter-

¹ Interstate law in contradistinction to international law signifies the law between the states of a compound state, particularly of a federal state, while international law relates to the law between nations, viz, fundamental sovereign states. There is no expression either in the German or in the French or Italian language which will precisely correspond to the American idea interstate. For the Swiss constitutional law there is of course an expression which exactly corresponds to the American idea interstate — intercantonal — the “states” of the Swiss Federal State being called Cantons. This term, however, is only applicable to Switzerland. It is precisely identical with the more general term interstate, with which it is used here without distinction referring to Switzerland.

To-day the “states” of Switzerland are regularly called Cantons, and more rarely “Stände” (old German term for political body). Before the Helvetic revolution the states of the Confederacy were termed “Orte,” inasmuch as they were complete sovereign members of the Confederation.

national law relations of the confederated states, the range of matters to which interstate law is applicable and accordingly the practical importance of this law are limited. Nevertheless, it forms a more or less important part of the public right of every federal state.

However, interstate law has not only interest for the federal states but also for other countries, for it shows us a higher system of international law, so to speak: an international law having its sanction not in the loyalty of those bound by custom and treaty and in the *ultima ratio* of war, but in a developed judicial and executive power. The special forms of interstate law depending on the existence of a real national executive power will, of course, always remain irreconcilable with the existence of pure international law, but other interstate institutions could perhaps be typical up to a certain degree for the further formation of international law. The tendency of contemporary international law is more and more towards an association of states not only on the ground of the administration of common economic interests but also upon that of justice. At this point it is well to remark that the American delegation to the Second Peace Conference, upon the introduction of a project for a "Cour de justice arbitrale," also brought before the conference Article XIX of the Constitution of the Confederated States of 1777.

Interstate law takes on a different status in the various federal states of the present time according to the independence left to the members of the confederacy by the constitution.

The Constitution of the United States has sought to assure the liberties of the States by means of a sharp restriction of competency of the confederation toward the States and by making a revision of the Constitution difficult, but it has at the same time almost entirely deprived the States of their position as international subjects. The case is a similar one with regard to the constitutions of Latin America and of the British self-governing colonies, which were fashioned upon the North American model. It is different in the German Empire. There the Constitution is flexible and the Empire has repeatedly increased its competency, making it in many respects the most united federal state. The States have — only in a few respects,

however — been nominally robbed of their international capacities. In so far as the interests of the Empire are not opposed to their treaties and laws, they have the power to make treaties among themselves or with foreign nations; they can even have diplomatic intercourse. This is, however, of practical importance to-day only in a limited sphere; it is a concession to old tradition and to the monarchical principle of the sovereignty of the confederate princes.

An intermediary stand between the American and the German system is offered by the Swiss Federal Constitution of 1848 and also the revised Constitution of 1874. According to this the strength of the National Government is assured by a relatively easily obtained revision of the Constitution, which, however, is sharply differentiated from the ordinary federal promulgation of law. On the other hand, the character of state of the Cantons, the Swiss "states," is left to them as much as possible, at least with regard to their mutual relations. This is shown by the fact that only through the intervention of the Federal Council can the Cantons enter into agreements with foreign countries about the administration of public property, border, and police intercourse. But the competency of the Cantons (powers of the states) reaches much farther in their mutual relations. Here, the Cantons are entitled to make, without the interference of Federal authorities, contracts about all matters coming within the powers of the states. The rights and duties arising through these contracts are to be classed according to international law, and the Federal tribunal, which as court of justice has under it the jurisdiction of the disputes between Cantons, has already repeatedly proclaimed that the relations of the Cantons among themselves are to be judged by the fundamental principles of the law of nations in so far as no Federal decrees are opposed to it.

The legal maxims which apply to the relations of the Cantons among themselves can be classed, on the ground of the modern Swiss Federal public law, in the following way, which is also applicable in substance to other federal states:

1. The Federal laws establishing a national system for affairs, which would be regulated among the Cantons by common international law and state agreements if these were sovereign states. To

these belong the stipulation of the Constitution that Switzerland form only one territory with regard to customs duties; also that the free right of settling in any community of any state be given all Swiss citizens, etc. On these grounds the character of the Cantons as states in their mutual relations is entirely taken away from them.

2. The Federal laws determining the competency and capacity of action of the Cantons in their mutual relations; the right of concluding treaties, the prohibition of political contracts or secession leagues, the decree against violence, the guaranty of the independence and territory of the Canton through the Confederation. To these belong also the stipulations of the Constitution as to the competency of the Federal tribunal to decide upon questions of intercantonal differences, both public and private; the control of the Federal Council and of the Federal Assembly over intercantonal agreements, and the cooperation of the Federal executive power for the carrying out of intercantonal agreements (formal intercantonal Federal laws).

3. The Federal laws governing the legal material relations of the Cantons to each other as states; the decree against the double taxation of the same object of duty in different Cantons; intercantonal legal cooperation in civil and criminal matters (*e. g.*, extradition, execution of civil sentences, etc.). Here Federal municipal laws take the place of international, viz, interstate legal maxims (material intercantonal Federal law).

4. The decrees of the purely intercantonal law, namely:

- (a) Intercantonal agreements;
- (b) Common international law for those conditions not coming under the head of Federal laws or under the laws of intercantonal contracts.

Of these four classes the first does not belong to interstate law; the essence of these legal maxims consists precisely in eliminating the system of a number of small states in the interest of national power and unity. The fourth class is diametrically opposed to the latter, for it is lacking in national unity; there the Cantons can wield justice by treaties, just as sovereign states, or put it to the issue of the maxims of common international law. This purely

intercantonal or interstate law is merely international law or particular law established by treaties and is of no especial interest here. What is original are the statutes of the interstate law which are promulgated by the Confederation and determine the relations of the Cantons with each other. It is with these norms, different and characteristic in every state association and every federal state, that we shall deal with mainly in the following. However, before we enter into a description of the Swiss interstate law of to-day, of the intercantonal law, it will be well to cast a glance over the historical development of this law.

Historically, Swiss interstate law can only be understood as a relic of former conditions. That does not mean, however, that it only has the character of a relic without capacity for life and motive for existence. Intercantonal law has changed together with the transformations of the league and developed organically with it. A large part of the Federal law of to-day has passed through the more incomplete form of interstate law.

The political history of Switzerland is divided, as well with regard to the national whole as to the separate Cantons, into two great periods. The great turning point is the year 1798, when, as a result of the French Revolution and through the immediate interference of the French Republic, the old Confederation, with its system of different leagues, protectorates, "gemeinen Herrschaften" (common subject territories), was destroyed and the manifold democratic, aristocratic, and monarchical constitutions of the individual members of the Confederacy were swept away. In its place the Helvetic unitary State was erected on the foundation of the sovereignty of the people. This Helvetic Republic, however, only lasted five years. By the Mediation Constitution of 1803, forced upon Switzerland by Bonaparte, then First Consul, Switzerland was again changed back into a compound state, viz, a federal state, and the Cantons were again made states. After the downfall of the Napoleonic Empire (1813) and under the influence of the reaction of that period, the Constitution of the Federal State of 1803 was replaced by a simple Confederacy. However, in opposition to the anorganic conditions before 1798, Switzerland yet remained a Confederacy held

together by uniform institutions. The Confederacy of 1815 lasted until the year 1848. As in the United States in the war of secession, thus also in Switzerland in the year 1847 there was a secession to fight against; it was the so-called "Sonderbund." The Federal treaty of 1815 had proved too weak to hold together the Cantons which, notably through religious questions, had come into conflict with each other. Therefore, a powerful national Government had to be created, which could give to Switzerland necessary strength and unity on the outside and firm coherence on the inside. This was reached through the Federal Constitution of 1848, which is based mainly on the same principles as the Constitution of the United States. This Constitution has since then been revised, at several times, especially by the total revision of 1874, and always in the sense of broadening the competencies of the Federal Government at the cost of the Cantons and of strengthening the immediate supremacy of the people at the expense of purely representative government. The fundamental relations between the Confederacy and the Cantons and of the Cantons among themselves, however, have remained unchanged.

II. HISTORICAL DEVELOPMENT (1291-1848)

The development of the Swiss Cantons into states and the origin of the Swiss Confederation is not the result of a single historical event, but the outcome of a long development. The Cantons of the present day were, in the eighteenth century, a part of the German Empire. Some of them were cities subject to the Emperor alone; others were a part of duchies, counties, and other possessions of territorial lords; others were associations of free peasants. The measure of their self-government varied a great deal; they were not states in the same sense as to-day, not even in that of the Middle Ages. In the thirteenth century, during the interregnum of 1250-1273, the German realm had completely ceased to represent an effective sovereignty such as protects the rights of the people, and the Habsburg family, who rose to the Throne with Rudolph I (1273), did not carry out national, imperial policies, but an expansive system of Austrian home policies, so that the communities menaced thereby

were forced to assure their possessions and liberties by leagues. The cities and territories of the Switzerland of to-day were forced to recur to such measures of self-aid because the house of Austria, whose political ballast was originally in Switzerland, was working systematically for the consolidation of its possessions there.

Thus, on the 1st of August, 1291, a perpetual league was concluded between the three forest Cantons, Uri, Schwyz, and Unterwalden, which may be considered as the foundation of the Swiss Confederation. It was a defensive alliance directed against the threatening encroachments of the Hapsburgs, whose acquired rights, however, were recognized in the league. Furthermore, the league aimed, by penal and legal procedures, to strengthen public security, which, owing to the weakness of the imperial power, was no longer sufficiently protected.

The stipulation made in articles 5 and 12 is also worthy of mention and reads as follows:

If dissension shall arise between any of the confederates, prudent men of the Confederation shall come together to settle the dispute between the parties as shall seem right to them, and the party which rejects their judgment shall be an enemy to the other confederates. If war or discord shall arise among any of the confederates, and one contending party refuses to accept proffered justice or satisfaction, the confederates are bound to assist the other party.²

These stipulations of the treaty of 1291 may be considered as the beginning of the modern system of international arbitration. Other leagues of the Middle Ages also contained clauses of arbitration, but none of these treaties has held until modern times. It is also worthy of notice that the law of the treaty of 1291 not only provides for an obligatory jurisdiction, but also a collective guaranty for the carrying out of the award.

In the period from 1291 until 1513 the Confederation was successively enlarged through the accession of several towns and territories. From 1513 to 1798 the Confederation was composed of thirteen "Orte," that is, thirteen states possessing every qualification

² English translation taken from J. M. Vincent, *Government in Switzerland*—New York, 1900.

required. Aside from these, there were the so-called "Zugewandte Orte" (allied states). A great part of modern Switzerland was then deprived of political independence because it was under the common rule of a more or less large number of other states.

The states and allied states accepted a different legal status towards foreign nations. Among the concluding parties of the first leagues there were imperial and territorial towns and estates; and when, after the victorious war of the Swiss against the German Empire in 1499, all "Orte" (states) had become really sovereign states there were still among the allied states nonsovereign communities and territorial lords, especially members of the German Empire. It was not, however, only the political status of the individual members of old Switzerland which offered a varied picture, but the federal relations among them likewise differed entirely. There was no unitary federal treaty, but a system of leagues. The leagues of the sovereign states among each other were sharply defined from those with the mere allied states. But also among the leagues of the "Orte" there again existed differences; those which had joined later had in part lesser rights. Moreover, every "Ort" was not even allied with every other. The old Confederation was therefore not similar in essence with the modern confederacies as they have arisen in America (1777-1789), in Switzerland (1815-1848), and in Germany (1815-1866). Yet, on the other hand, there existed an organic connection between these different federal leagues, first, because in substance they materially agreed and because in the course of time common institutions were created, which were considered as representative of the commonalty and which proceeded as such towards foreign lands, according to international law.

These leagues aimed above all, just as the first one of 1291, at establishing defensive alliances. A broader, more general, and original aim was also that of fortifying the internal legal order, namely, the security of the ways of traffic. The so-called "Pfaffenbrief" (priest charter) of 1370 was also a state treaty, which established the principle of *forum domicilii* (court of the domicile), limited the jurisdiction of the church, forbade arbitrary seizure, and other things besides. Another treaty, the so-called "Sempacher Brief" (Sem-

pach charter), even stipulated norms as to martial law, and was probably the first state treaty relating to the humanization of war. The "Orte" of the old Confederation had the right to conclude treaties as well with each other as with foreign nations, especially since in 1499 they became independent — that is, sovereign in fact, and in 1648 through the Peace of Westphalia became so in form. As the leagues were perpetual ones, the pledges which they assumed took precedence over later treaties, but the "Orte" had in an authorized manner the right of free, international, and interstate concluding of treaties, except the five states which had last joined the league and only had a limited right of concluding treaties.

As the Confederation has arisen from leagues and was not created as an organization, what it naturally first felt the need of was organs. Even in the beginning the individual leagues provided that the deputies of the allied communities must meet in common councils, but that varied in every league according to the contracting parties. It was only gradually that there was formed through custom from these separate meetings a unitary "Tagsatzung" (Diet), which met regularly at a fixed place. This development was mainly necessitated by the fact that a great many of the "Orte" had made common conquests and governed in common over these conquered territories.

As a rule, it was only the "Orte" which took part in the Diets; the allied states only sent delegates upon special request. The Diets had, on the whole, the character of a congress of envoys. They had no specified power, like a modern federal parliament, but dealt with everything about which the governments of the confederate states gave instructions. Resolutions could not be taken by majority, excepting where the leagues made such a provision for special cases. Moreover, every state could refuse to join in the treaties concluded by the Diet with foreign nations. On the contrary, however, the states could make contracts with each other at the Diet.

Aside from the Diet there was another permanent organ, the "Vorort" (presidential state). This institution was based entirely upon custom. Zurich obtained this position; its delegates presided at the Diet and when the Diet was not in session its government looked after the current affairs, namely, the diplomatic intercourse. It had, however, no exclusive right to do the latter.

One of the weightiest limitations which the leagues imposed upon the sovereignty of the states was the interdiction of self-aid, of war with each other. The subsequent leagues also stipulated, as that of 1291 had done, the principle of obligatory mediation and arbitration. When differences broke out between the states the mediation or arbitral procedure had to be called upon, in so far as a party required it. The stipulations in the individual treaties differed; however, a sort of confederative unwritten law was formed. Each party designated its own arbitrators, who when unable to reach an amicable understanding elected a neutral umpire from some one of the states. Such resolutions have repeatedly been passed and only recently the Federal Court had recourse to such a sentence in an intercantonal process, as to a decision of actual legal authority. Obligatory arbitral procedure has not, however, saved Switzerland from civil wars, but it has undoubtedly rendered great service to the Confederation. The greatest internal war of Switzerland — the so-called Zurich war (1436–1450) — was precisely an execution war against Zurich, which did not want to accept the arbitral procedure.

As a result of the Revolution and French intervention of the year 1798, which brought about the founding of the democratic Helvetic unitary State and the elimination, on principle, of all feudal elements in the organization of the State, all interstate law came to an end. The states which up to that time had been sovereign states now sank to mere administrative districts deprived of all autonomy, when they were not wholly suppressed and consolidated with other Cantons into new districts.

This complete break with the past must soon call for a reaction. The Helvetic Republic never reached a tranquil development. In the numerous new projects for a constitution, which originated at the time, the attempt was made to call into existence both a central and local organization for the administration. Here it must be remarked that then for the first time in Switzerland, and probably for the first time in all Europe, the Constitution of the United States was held up as a model to be copied for a state to be organized on a federative basis.

The external and internal troubles of the “*Helvetik*” (as the

period from 1798 to 1803 is called) came to an end when Bonaparte, in the autocratically assumed rôle of mediator of Switzerland, imposed the Mediation Constitution of February 19, 1803. Hereby the nineteen Cantons having equal rights were recognized as states and to each was given its own constitution and all the powers which were not expressly ascribed to the Confederation. Switzerland was given the character of a federal state, albeit of a weak one, such as then suited the needs of French politics. The organization of the confederation was based upon that of the old Confederacy. The highest organ was the "Tagsatzung" (Diet), in which a number of larger Cantons had two votes; the others only one. The envoys voted according to instructions. The official business was dispatched by the directorial Canton, for which position six Cantons changed off in yearly terms. The president of the directorial Canton had the title of "Landammann der Schweiz" and was invested with no little authority.

The Cantons could not have any diplomatic intercourse with foreign nations and could only enter into contracts by special permit from the Diet. They were not allowed to form any special alliances with each other and the Constitution did not make any mention of nonpolitical contracts of the Cantons with each other. The Diet, however, by a decree of June 29, 1803, recognized the power of the Cantons to make contracts among themselves relating to church, civil, police, and local matters, in so far as they brought these agreements to the knowledge of the Diet, so that the latter could examine them as to their accordance with the Federal Constitution. These contracts were considered as a particular kind of international contract and were judged according to the principles of international law.

Aside from these particular intercantonal contracts there was still another special kind of intercantonal agreements which was intermediary between the Federal laws and the aforementioned contracts. The Constitution had given to the Confederation only a rather limited competence and a revision of the Constitution was not provided for. The powers of the Federal Government could therefore not be increased through decisions by majority. That, however, did not prevent matters from being dealt with at the Diet which did not,

according to the Constitution, come under the jurisdiction of the Confederation, but for which a uniform order was sought.

When the Diet came to a decision upon such matters there arose, when there was a majority or unanimity, a Federal concordat³ which was, however, only binding for the agreeing Cantons. The decisions by majority, on the contrary, which the Diet made within its constitutional competency were of course binding for all Cantons. These Federal concordats were considered, as were the actual decisions of the Diet, parts of the Federal law; they originated outwardly in the same way as the Federal laws, but they had binding force as state treaties only for the Cantons which accepted them or later adhered to them. In this manner many matters have been uniformly settled for a large number of Cantons. Of these Federal concordats, some are still in force to-day, while others have been abrogated and replaced by Federal laws.

When disputes arose between the Cantons the Federal authorities had first to endeavor to bring about a mediation. Failing this the dispute was then decided, as a last resort, by the Diet. The latter, for this purpose, constituted itself into a syndicate (federal court of justice) in which all Cantons had only one vote and their envoys could vote, not as in other matters according to the instructions of their directors, but freely as judges. In case the Diet was not in session the "Landammann" (President) had authority to introduce mediation.

³ The expression "concordat" for intercantonal contracts seems to come from the fact that the first contract made between two Cantons, after the reestablishment of the cantonal personality of statehood under the Mediation of 1803, dealt with matters relating to the church. As the treaties between civil governments and the Roman curia (papal court) had been designated as concordats ever since the Middle Ages, it seems that these intercantonal agreements had also been given the name concordat. The name was then applied also in other cases which had nothing to do with church matters.

However, it does not follow that all intercantonal agreements were called concordats. The terminology has unhappily never been strictly adhered to, but it can be said that as a rule only those treaties were called concordats which established legal norms and did not deal with mere concrete relations. About the different meanings of the "eidgenössische Konkordate" (Federal concordats) before and after the introduction of the Federal Constitution of 1848, as opposed to the special concordats, it will be discussed farther on.

With the downfall of Napoleon, his work, the Mediation Constitution, also fell. In the years 1813 to 1815 a unitary organization was totally lacking in Switzerland, as the Mediation Constitution was formally abolished; the negotiations regarding the conclusion of a new Federal treaty advanced but slowly in some of the Cantons, owing to separatistic efforts. Finally, in September, 1814, the establishing of a new constitution was reached. On the 7th of August, 1815, the oath was solemnly taken to the new Confederation, to which, in the meantime, in consequence of the new disposition of the European relations through the Vienna Congress, three other Cantons had joined. By that the Confederation reached the number of twenty-two Cantons, which it still has to-day.

The League of 1815 was a confederacy, viz, a union of states, whose organization was based exclusively upon the allied states and whose constitution rested upon the principle of agreement — that is, it could only be changed by unanimous consent. But it is not correct with the prevailing theory to perceive in these confederacies merely international law relations of partnership. A federal government, even though weak and incapable of development, was attained through the Federal League, and the sovereignty — viz, the complete independence — of the allied states had ceased to exist. The League was perpetual and therefore irredeemable. With regard to the secession of 1847, Federal execution was provided, but not war of an international character waged.

But it is unquestionably true, on the other hand, that the twenty-two Cantons of the Confederation still continued to exist as states; they styled themselves therefore "sovereign," as in the present Federal Constitution, though they were no longer sovereign, *i. e.*, wholly independent. Their personality in international intercourse was not suppressed. They could conclude treaties about matters of state economy and public administration, as well as military capitulations, by means of which the enlisting of Swiss soldiers was permitted to foreign governments. These agreements must be brought to the knowledge of the Diet and must contain nothing contrary to the Federal treaty or to the rights of other Cantons. Declarations of war and conclusions of alliances and commercial treaties were exclusively

the affair of the Diet as the representative of the entire Confederation. Diplomatic intercourse also belonged to the Confederation; still, it was not forbidden to the Cantons to negotiate with a foreign country regarding matters within their competency.

The right which Cantons had of concluding treaties with each other was limited only by the principle that these agreements between the Cantons should not be opposed either to the Federal agreement nor to the rights of a third Canton. The concordats and agreements concluded under the Mediation Constitution were ratified by the new Federal agreement as far as they were capable of being united with the latter. The Federal concordats were, however, revised by the Diet after 1815 simultaneously with the actual decrees of the old Diet, but in substance they were ratified. Since the competency of the League of 1815 was more restricted than that given by the Mediation Constitution, some of already existing Federal laws were changed into mere concordats.

As already under the Mediation, there were besides the real intercantonal agreements Federal concordats which were intermediary between contract and law; thus Federal law has in this way become further developed under the Federal treaty of 1815. As the Federal treaty could not be revised by a majority of votes, and as the competency given to the Diet by it was insufficient, the Diet had to be satisfied to consider the decrees made by it outside of its actual jurisdiction as Federal concordats and therefore only binding for the consenting Cantons. In so far the condition was the same as under the Mediation. On the other hand, this peculiar institution of Federal concordats was further developed, in a peculiar way, by a decree of the Diet of July 25, 1836. While it was undisputed that the agreements of the Cantons concluded outside of the Diet were to be judged among themselves entirely according to international law, even in reference to giving notice, still it was different with the Federal concordats, which although not universally binding, yet constituted a part of the Federal law. The decree of 1836 acted as intermediary between the fixed irredeemability of the Federal laws and the free redeemability of undelayed agreements. According to this no Canton that had agreed to a concordat concluded by a majority of all the Cantons at the Diet could withdraw from it without having received

the consent of the majority of the Cantons subscribing to the concordat in question. The withdrawal being granted by the majority of the contracting parties, it was also necessary to determine whether the concordat should endure for the remainder. In case the withdrawal was refused, the Canton had the right of appeal to the Diet and the latter had power of itself to permit the withdrawal. But the Canton released in this way from the concordat was bound to give an indemnity to its former joint contractors, within the measure that could be determined according to the nature of the matter.

When the number of the contracting parties was diminished by withdrawals to eleven — that is, to less than the majority of the Cantons — then the agreement lost the character of a Federal concordat.

With regard to disputes of Cantons with each other, all measures of self-aid were prohibited to the Cantons, just as it should be in every confederacy. They had to submit themselves, just as was the case before 1798, to the so-called "Eidgenössisches Recht" (Federal mediation and arbitration). The Federal treaty designated as coming under Federal mediation and arbitration all disputes not relating to the rights guaranteed by the Federal treaty. About this decision a dispute arose in which the representatives of the national idea represented the right conception, that in these very weighty questions (integrity of cantonal property, freedom of trade among cantons, etc.) the Diet, as the highest organ of the league, was competent, whilst the partisans of cantonal sovereignty interpreted that decision with restrictions and accepted no obligatory Federal tribunal when the latter was not expressly stipulated by the Federal treaty.

Private legal disputes between Cantons were also to be decided by Federal mediation and arbitration, as no Canton, on account of its sovereignty, could be compelled to accept a sentence before the jurisdiction of another Canton.

The mediation and arbitration proceedings were as follows: Each of the contending Cantons was to designate two judges from the magistrates of other Cantons.

In the first place, these judges were to try to bring about friendly mediation. If they did not succeed in bringing about an understanding, they then elected from among the high Swiss magistrates

one as president who neither belonged to a party nor to the states of which any of the judges designated by the contending Cantons was a citizen.

In case of necessity the president was elected by the Diet. The court thus formed had to try to bring about a second mediation or so make itself a binding agreement when all parties were ready to vest it with such powers. If both forms of the mediation failed, the arbitrators decided in first and last instance according to law. The Diet executed the award if it was not freely executed by the defeated party.

The organization of the Confederation from 1815 to 1848 had a decidedly federative character. The highest organ was the "Tagsatzung" (Diet), in which all the twenty-two Cantons were represented by deputies. All Cantons, whether large or small, had one vote, but the half Cantons (which had been formed by division) had only one vote which they could exercise only in common. The deputies were instructed by the governments and the Diet was not considered as a parliament. Besides the Diet there existed a "Vorort" (presidential state), which changed about every two years between the Cantons Zurich, Berne, and Lucerne and exercised the same administrative and business functions as before 1798. In addition to the keeper of the record and certain military organizations there were no federal organizations which were not primarily cantonal. The Confederacy, except in individual military matters, was lacking in all direct authority. The powers of the Federal Government were exercised, not directly by the Confederacy itself, but through the Cantons.

III. INTERCANTONAL LAW UNDER THE PRESENT FEDERAL CONSTITUTION ⁴

1. *The legal status of cantons*

The Cantons are to be considered as states in their relations to the Confederation, to foreign nations, and among each other. Though in all federal states the federal government be superordinate and the

⁴ Modern intercantonal law has been fully and very ably treated by Arnold Bolle, "Das interkantonale Recht," La Chaux-de-Fonds, 1907. This work is the only comprehensive and systematical description of the subject. Special ques-

member states may be deprived of their statehood in numerous and important matters of public administration, the fundamental relations between Confederation and Cantons are of contractual nature, *i. e.*, they can not be changed but by mutual understanding. Thus, article 5 of the Federal Constitution, which guarantees to the Cantons their territory and sovereignty, is not, as other parts of the Constitution, subject to constitutional revision, unless the Cantons concerned agree. It is the same about the principle of equality of the Cantons. If unlimited powers of constitutional revision ("Kompetenz-Kompetenz") were vested in the Federal Government, no logical difference between a federal and a unitary state could be established. However, it must be said that the rights of member states within the Federal Constitution, beside the fundamental rights of statehood and equality, are presumed to depend on Federal constitutional law.

The legal personality of the Cantons in international law has not been taken away by the Federal Constitution. The Cantons can acquire rights and duties by treaties with foreign nations about specified matters, *viz.*, administration of public property and border and police intercourse. Such treaties are to be negotiated by the Federal Council, because the Cantons are not authorized to have immediate official intercourse with foreign governments, except purely administrative relations to inferior officers of other states.

The statehood of Cantons in their mutual relations is determined by the constitutional limitations upon cantonal powers. As far as cantonal law has not been superseded by Federal law, the Cantons have retained the status of states both in relation to the people residing on their territory and towards each other. Therefore, the Cantons exercise the powers left to them in full independence, limited only by the rules of federal interstate law. Thus, the Cantons are above all authorized to make laws and provisions about all matters within their powers. It is a question of interpretation whether in matters ruled by Federal law the latter excludes implicitly cantonal legislation in cases not expressly settled by Federal law.

tions, as, *e. g.*, on settlement, extradition, etc., have been treated in monographs. For further information consult the two leading commentaries on the Federal Constitution by Burckhardt and Schollenberger.

The Cantons exercise their powers autonomously not only as to their interior organization, but also as to interstate relations. In this respect, however, they are bound by article 60 of the Federal Constitution, which reads as follows:

All Cantons are bound to treat the citizens of the other confederated states like those of their own state in legislation and judicial proceedings.

But this reciprocity clause does not exclude a different treatment of persons residing in one Canton and those living in another.

Beside the autonomous regulation of matters of intercantonal importance, the Cantons have the power to conclude treaties among each other concerning such subjects. The treaty-making power of the Cantons is not identical with their legislative and administrative power, which covers a larger field of action. Article 7 of the Federal Constitution recognizes the right of the Cantons to make conventions among themselves upon legislative, administrative, or judicial subjects, *i. e.*, upon all subjects of activity of a state. This general permission, however, is limited by a restriction of general character — all separate alliances and all treaties of a political character are forbidden. Though the Cantons may pursue a policy of their own as separate commonwealths, they may not combine to common political action by treaties.

While the *jus foederis*, albeit restricted, is recognized, the Constitution seems to exclude an interstate *jus legationis*, because diplomatic intercourse among Cantons is superfluous for ordinary transactions, and political cooperation of Cantons is formally forbidden. It is a question of little importance, and not yet decided by the Federal authorities, whether official delegates of a Canton enjoy on the territory of another Canton the privileges of extraterritoriality.

One of the most important restrictions laid upon state powers is the formal and total exclusion of all means of self-aid. Though military legislation is within the exclusive power of the Confederation, the Constitution itself guarantees to the Cantons to a certain degree military self-administration and the right of disposing of the troops recruited in their territory, but only for maintaining interior order — never for violence against other Cantons or foreign nations.

The interdiction of self-aid does not relate only to war, but to all kinds of self-aid, as retorsion, differential treatment, seizure, ect. All intercantonal differences must be settled amicably, *i. e.*, by negotiations between the Cantons concerned or by arbitration or by the Federal Court.

2. Cantonal territory

The Federal Constitution guarantees to the Cantons their territories, but makes no other provisions relating to this subject. Therefore, the territorial relations of Cantons with each other are ruled by common international law or by interstate treaties. Rivers forming the boundary between two Cantons are, according to a recent decision of the Federal Court, divided by the middle line, not by the *thalweg*, because the Swiss rivers are generally not navigable. Navigation, however, will become important in Switzerland and the Federal Assembly has voted this year a bill for a constitutional amendment conferring powers on the Confederation to make regulations on the exploitation of water powers and on navigation.

The intercantonal boundaries, as far as they are not geometrically fixed, can be changed by natural processes. If in such cases international law is to be interpreted by analogy to private law, it must be presumed that Swiss private law, as embodied in the new Federal civil code, is applicable.

If cession of territory from one Canton to another is to be effected, such cession has to take the form of an intercantonal treaty and must therefore be brought to the attention of the Federal Council. If the cessions have not the character of subordinate boundary regulations, but relate to a considerable territory, such treaties are certainly to be classed as political treaties, which are forbidden. However, such a cession might be in certain cases in the interest both of the Cantons concerned and the Confederation itself. In a case of this kind the Federal Assembly as presumptive possessor of all Federal powers would certainly be entitled to make such treaties lawful. But in no event intercantonal cession necessitates a revision of the Constitution, as some writers suppose. The Constitution enumerates the Cantons forming the Confederation, but only as political entities,

which remain the same as long as the same political organization continues to exist on a part of the territory. Only in the case of the creation of new Cantons by way of fusion or dismembration constitutional revision would be necessary.

The territorial rights of the Cantons can under the Federal Constitution be modified, beside the unimportant case of physical changes, only by treaties and not, as in international law, by prescription, *i. e.*, undisputed possession. Thus, the Federal Court held that the Canton of Zurich, which during more than half a century exercised sovereignty over the southern half of the Rhine at Schaffhausen, could not acquire legally that river territory because the Canton of Schaffhausen had never consented through its constitutional organs to an abandonment of its exceptional rights on the whole river. The court did not give arguments for its opinion, which is, however, justified because the Federal Constitution guarantees the powers vested by the cantonal constitutions in the state authorities.

The constitutional guaranty of state territory by the Confederation does not only protect the Cantons against attacks, it forbids every Canton to interfere with the *status quo* of another Canton.⁵ The interstate rules of vicinage are the same as those of international law, *e. g.*, if a river flows through two Cantons, the upper Canton is obliged to secure to the lower one the natural flow of the water, but according to private law it is authorized to accumulate the water during the usual hours of rest of work. The pending constitutional amendment will give to the Confederation the necessary power of making provisions for the exploitation of intercantonal rivers. Since in all the most important water powers of Switzerland more than one Canton is interested, and this source of energy is a most valuable equivalent for coal, which must all be imported, the question of intercantonal rivers is one of great national concern and can not be longer left to interstate negotiations and quarrels.

So-called interstate servitudes are rare, but they exist and are recognized by the Federal authorities. By treaty one Canton can grant to another the exercise of territorial rights, *e. g.*, the prerogative

⁵ AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. I, pages 245-249.

of conceding the right of fishing, or the incorporation of a township in the school or church system of another Canton.

If intercantonal cessions of territory take place, the rules of succession of states are applied in the same way as in international law. The rights acquired under the former rule must be recognized by the new sovereign as if they were acquired under his own law.⁶

3. *Intercantonal treaties*

The power of Cantons of concluding treaties is determined positively by the recognition of interstate treaties on legislative, administrative, and judicial matters and negatively by the prohibition of particular leagues and political treaties in general and by the condition that treaties on lawful subjects contain nothing contrary to the Confederation and to the rights of other Cantons. While this condition is clear and flows necessarily from the preeminence of Federal and interstate law over cantonal law, the two other prescriptions need some explanation. The notion of a political treaty is not defined by the Constitution and it is indeed impossible to do it. It may be said in general that an interstate treaty is political if it tends to strengthen the influence of one or more Cantons at the expense of others, either in state or in Federal politics, *e. g.*, it would be unlawful if Cantons of similar political tendencies would combine for joint exercise of their powers relating to Federal legislation. There are conventions which in some cases may be purely businesslike, whilst under certain circumstances they might be irreconcilable with Federal interests, *e. g.*, conventions concerning the construction of railways. Since the establishment of the Federal State in 1848 the question of political treaties has fortunately ceased to be a matter of actual Swiss politics, but in the stormy period of the liberal reforms in the thirties alliances of liberal Cantons on one side and of conservative and Catholic Cantons on the other played a great and dangerous rôle in Swiss politics.

The enumeration of lawful treaties, viz, treaties on legislative, administrative, and judicial matters, does not relate to special sub-

⁶ AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. I, pages 237-245.

jects, but seems to cover the cantonal powers in all possible forms. Legislation in contradistinction to administration and justice can not mean legislation as constitutional expression of the supreme will of the state, but is identical with regulations, i. e., promulgation of abstract rules to be applied uniformly in the contracting Cantons, e. g., the concordat on the cattle trade is an example of a purely legislative convention, because it provides uniform private law on a special subject.

The existing interstate treaties are to be divided in two classes, viz, (a) Federal concordats and (b) particular concordats, and other interstate conventions. Federal concordats as they existed under the Mediation Constitution and the Federal treaty of 1815 and formed an intermediary form of intercantonal and Federal law can not be concluded since 1848, because the old Diet has been abolished, but the concordats existing in 1848 have been recognized by the Federal Constitution and exist to this day, though some embrace now only a minority of Cantons. Under the present Constitution those interstate conventions are called Federal concordats which either go back to the Federal concordats of the Mediation and the Confederacy or have been concluded since by a majority of Cantons or are at least of interest for and open to Cantons other than the original signatories. All other intercantonal conventions are particular concordats or ordinary conventions. Though the distinction between the two classes of intercantonal agreements is not very sharp, the Federal concordats are in one respect differently treated, inasmuch as the Federal Council has to watch *ex officio*, not only as in other concordats at the request of the parties, over the observation of Federal concordats.

The Federal Constitution does not only place limitations of material character on the treaty-making power of the Cantons, but it contains also prescriptions of formal nature. The contracting Cantons are bound to submit all conventions concluded among themselves to the Federal authorities, viz, the Federal Council, which is authorized to prevent the execution of unlawful treaties. This prescription is purely formal. Though the Federal Court refused once to apply a convention not submitted to the Federal Council, an intercantonal

treaty is nevertheless executory according to the prevailing opinion as soon as it is ratified by the cantonal authorities in which the treaty-making power is vested, even if the Cantons have not brought it to the attention of the Federal Council. If, on the contrary, the constitutional prescription has been observed and the interstate convention has been approved by the Federal Council this approbation has not the character of a final sanction. If later on either the Federal Council or the Federal Court have to secure the execution of the convention, they are authorized to examine again its lawfulness.

Interstate treaties may conflict with Federal law or with the rights of other Cantons or with rights and interests of the Confederation. In the first case they are, so far, nul and void; in the two other cases the Federal Council has power to prohibit their execution. If the Federal Council refuses to recognize such a convention, or if other Cantons protest against it, the convention is to be brought before the Federal Assembly, which examines *ex officio* the lawfulness of the assailed treaty and pronounces either approbation or prohibition. But even in this case the Federal Assembly can come back on its decision and the Federal Court is not bound by such an approbation of the Federal Parliament.

If Federal law is changed, either by ordinary legislation or by constitutional revision, interstate treaties become *ipso facto* nul and void as far as they conflict with the new Federal law.

If two Cantons settle matters of common interest, not by formal treaties, but only in the way of a *modus vivendi* by which no party is legally bound, the approval of Federal authorities is not necessary. However, the Federal Council, which has to watch over Federal law, could intervene and Cantons injured in their rights might lodge a complaint with the Federal Court against an unlawful practice of other Cantons.

If intercantonal treaties are not unlawful, they are not only allowed, but effectively protected by Federal law, even if they have not been submitted in due time to approval. In the case of Federal concordats the Federal Council has to watch *ex officio* over their execution, at least as far as public interests are engaged. As regards particular concordats and other interstate conventions the Federal

Council intervenes only at the request of a Canton and it is obliged to secure in such a case the execution of intercantonal treaties, even, if necessary, by force. In such case, however, the Canton which is in the rôle of the defendant will probably contest the legal point of view of the plaintiff, so that before a Federal decree of execution may be issued the Federal Court has to decide the case. If a Canton is reluctant to execute a sentence given against it, the Federal Council is bound to compel it.

But practically intercantonal disputes regarding conventions do not have the character of an actual conflict, but that of a legal dispute, which is settled by the Federal Court if the parties do not institute an arbitral tribunal for the case. Besides the provisions of the Federal Constitution for the judicial settlement of interstate differences which are treated below, the Constitution provides still another mean which secures indirectly but very effectually interstate treaties. Any private individual or corporation may lodge a complaint (petition of public law) with the Federal Court, if deemed to be injured by nonapplication or wrong application of any intercantonal agreement by cantonal officers. The subjective rights acquired through or under intercantonal treaties enjoy the same judicial protection as the rights granted by the Federal or cantonal constitutions or by international treaties. This jurisdiction of the Federal Court relates only to questions of public law, so that cases in which cantonal courts apply private law established by concordats can not be brought before the Federal Court as petitions of public law, but only as ordinary complaints, under the same circumstances under which an ordinary appeal lies from the cantonal civil courts to the Federal Court. It is the same with penal prescriptions of concordats.

The conclusion of intercantonal treaties is ruled by cantonal constitutional law. In all Cantons the executive power is authorized to negotiate with other cantonal governments, either at its own initiative or at the request of the Parliament. In some cases of Federal concern, if Federal legislation seemed to be impracticable for the time the Cantons negotiated concordats at the invitation of the Federal Council and under the presidency of a Federal councilor; thus, recently the concordat concluded in order to adapt interstate law to

international law concerning the *cautio judicatum solvi* (convention of The Hague) and the concordat on automobile traffic. By the Federal law on fishing the Cantons are even bound to make conventions for regulating the fisheries in intercantonal waters.

Before the ratification, as an act of interstate intercourse, can take place, *i. e.*, before the covenanting Cantons declare to each other to be bound by the agreement they have negotiated and signed by the cantonal executive authorities, the latter have to obtain the approbation of the cantonal legislative assembly and in many Cantons besides that the sanction of the people. In some Cantons the constitution prescribes expressly that all interstate conventions, or at least the most important classes of them, have to pass the plebiscite in the same way as ordinary legislative acts (obligatory referendum), or the popular vote is to be taken because all decrees of the parliament, and therefore also the decree of ratification of an interstate agreement, are subject to the final sanction of the voters. In other Cantons there exists only a facultative referendum (*i. e.*, depending on being requested by a certain number of citizens) or the conclusion of interstate conventions is vested exclusively in the legislative power. In practice the cantonal executive officers are generally competent to make agreements on minor matters or without legal force (*modus vivendi*), especially reciprocity declarations.

The extinction of intercantonal treaties as consequence of their becoming impossible or by *mutuus dissensus* of the parties or other causes general to all contracts does not differ from that of international treaties. Regarding denunciation of intercantonal conventions there is, according to the opinion of the Federal Court, to be made the same distinction as in international law, *viz.* between conventions having a concrete object (*e. g.*, territory, servitude, financial guaranty, etc.) and concordats establishing for the parties common rules of law (concordats). In the first case denunciation is excluded, unless the maintenance of the treaty becomes for one of the parties irreconcilable with its existence as an independent community or unless circumstances have changed to a degree that the *raison d'être* of the treaty has ceased to exist. The theory of the *clausula rebus sich stantibus* has been recognized by the Federal

Court as applicable to interstate agreements. In the case of concordats we must distinguish between Federal concordats anterior to the year 1848 and other conventions of this character. The former are still to-day subject to the special system of denunciation established in 1836; the latter, on the contrary, can be denounced freely at any time, in the case of modern Federal concordats, by simply giving notice to the Federal Council.

As for the abolition of interstate treaties by Federal law and Federal authorities the reader may be referred to that which has been said above.

4. The pacific settlement of intercantonal differences

It has already been stated that self-aid of all kinds is banished from interstate relations. The settlement of disagreements and disputes is left in the first line to interstate negotiations, but there is no constitutional prohibition against Federal good offices and mediation being requested or offered. If an amicable understanding can not be arrived at, the Cantons, if they do not drop the question, are compelled to have recourse to judicial proceedings. Two possibilities are offered to them — arbitration and process before the Federal Court. The first eventuality is of no practical importance and never resorted to, but the Constitution formally empowers and obliges the Federal Council to execute arbitral sentences in intercantonal disputes. The normal way of settling intercantonal disputes is by petition to the Federal Court. This supreme tribunal of Switzerland, which has its seat not as the Federal Council and Assembly in Berne but in Lausanne, is composed of sixteen judges and nine deputy judges. No special provision is made for the representation of the states, only by the act of organization of Federal justice it has been made a duty of the Federal Assembly, which elects the judges, to provide for a representation of the three national languages. The judges who are citizens of a Canton being a party in a trial can not sit in the court for that case. The judges enjoy on the territory of the Canton where they exercise their functions the same immunities which are accorded to the Federal Council. Before the constitutional revision of 1874 the Federal

Court was not a really permanent tribunal, but was convoked only as far as business was pendent and the judges were not professional officers of the Confederation. Since 1874 the Federal Court is a fully equipped and standing court; the judges are excluded from other official functions and from business. The court is divided into several senates and sections, the most important of which are the section for civil cases and the section of cases in public law.

The jurisdiction of the Federal Court over intercantonal disputes is of a double nature — disputes in civil law and disputes in public law. The practical difference between the two classes of lawsuits is, in the case of Cantons, of minor importance, because in both events the Federal Court acts as court of first and last instance. For private persons and corporations, however, the possibility of appeal in private and public law is fundamentally different.

A civil suit between two Cantons is a dispute on rights of private character such as a private person might possess. Not all disputes of a financial nature are civil, *e. g.*, a process on the collection of taxes is a question of public law. The jurisdiction of the Federal Court over civil cases is established in conformity with international law, according to which no sovereign is bound to recognize the jurisdiction of another except in cases of property. The Federal Court, however, is always competent. The Constitution mentions among the civil cases to be submitted to the Federal Court disputes between communes of different Cantons concerning the citizenship of individuals. It is possible that the Cantons act instead of the communes and this jurisdiction ought logically to be placed under the competency of the section for public law. Interstate disputes on the "Heimathlosat" (people having no allegiance) — a matter formerly regulated by a concordat — are decided in the same way by the Federal Court.

Interstate disputes in public law are those in which the Cantons appear not only as parties but in their peculiar quality as political entities. The law on the organization of Federal justice mentions especially as interstate disputes those on boundaries, powers of the authorities of different Cantons, interpretations and application of interstate treaties, etc. In some matters which are of less judicial

but rather administrative character and which are in the main regulated by Federal law, the Federal Council instead of the court is authorized to settle interstate disputes (fisheries in intercantonal waters, police over rivers and torrents in the Alps, police of forests, etc.). But the presumption always militates in favor of the jurisdiction of the Federal Court.

There can be a connexity of interstate disputes and conflicts between a private individual or corporation and a Canton foreign to them, *e. g.*, if in one Canton the water is diverted to the detriment of a mill in another Canton or if the property of one territory is endangered or deteriorated by constructions or exploitations made in another Canton. In such cases the private plaintiff has no independent right of action against the Canton from the territory of which he is injured; the Canton alone to which the plaintiff belongs is entitled to appeal to the Federal Court in cases relating to non-conventional interstate law. The different situation in the case of violation of an intercantonal treaty has already been treated above. But if the dispute of the private plaintiff has — as it would have in the cases cited above — the character of a civil process, the plaintiff might go before the Federal Court directly, because this tribunal has original jurisdiction in all cases between a Canton and any private individual or corporation, if one party requires it and the contested value amounts to at least 3,000 francs. This provision of the Federal Constitution makes superfluous a right of Cantons to intervene in favor of their citizens if those are engaged in disputes with other Cantons. If a Canton is neither interested as to its private rights nor as to its public powers, it is excluded from intervention in interstate disputes of the inhabitants of its territory or its citizens. These are fully protected by Federal jurisdiction, both in matters of private and public character.

The law applied to interstate disputes by the Federal Court is in civil cases that private law, federal or cantonal, which in analogous cases between private parties would be applied according to the principles of intercantonal private law. In cases of public law Federal law takes precedence over all other legal prescriptions which might be in question. In second line conventional interstate law

peculiar to the parties will be applied and as subsidiary rule common intercantonal and in last resort international law.

Disputes between Cantons are not necessarily of a legal character. Interests not protected by law, and therefore not recoverable before a court, may be of no less importance than subjective right, and if menaced or injured by another Canton may cause serious difficulties. In such cases intervention would be justified according to the current doctrine of international law, but is impossible in the relations between Cantons. There may be other cases in which, though they can be decided according to law, such a decision, albeit unassailable from a legal point of view, may be most unsatisfactory from the standpoint of equity and national politics. As the Cantons are strictly forbidden to have recourse to self-aid and can not, as sovereign nations can do, refuse to accept judicial proceedings in cases where vital interests are engaged, another mean must be provided for such conflicts. It consists in the intervention of the Federal Assembly. Though the Constitution does not give to the Confederation special powers of this kind, the power to make the necessary provisions for keeping order and especially interstate peace belongs to the absolute implied powers of every compound state. It is impossible to suppose that the Constitution, by the prohibition of self-aid, would bring an interstate dispute simply to a deadlock or have it judged according to rules evidently not suiting the case. In this way the Federal Assembly intervened in 1884 at the request of the Canton of Zurich, when the Canton of Argovie refused to secure the payment of debts which some of its cities had guaranteed collectively with communes of the Canton of Zurich, while these latter had already been compelled to pay their share. The Confederation made an arrangement in making a favorable loan to the Cantons concerned prescribing the conditions of the payment and redemption of the debts.

If in spite of all constitutional provisions violence between Cantons is threatening or even breaks out, the Cantons concerned are obliged to give immediate notice to the Federal Council or in extreme cases are authorized to ask the aid of other Cantons. This latter provision, however, is obsolete. Though the Constitution

does not mention it, it is evident that in cases of interstate conflicts the Federal Council must intervene *ex officio*. The executive has, however, only limited power to settle the dispute. If armed intervention is necessary, the Federal Assembly is to be summoned, at least if more than 2,000 men are mobilized or the troops remain more than three weeks in active service.

5. *Matters of interstate concern*

Matters of interstate concern are matters which are ruled either by interstate law, Federal and intercantonal, or by pure Federal law, but having materially though not formally interstate character. To the first class of legal relations those belong in which Cantons are treated or recognized by Federal law as states, *i. e.*, as essentially independent and coordinate commonwealths in their mutual relations; to the second class those provisions of Federal law pertain which establish uniform rules without reference to interstate relations, but relating to subjects in which a different treatment, by the Cantons, of citizens and noncitizens might be supposed. Thus, the right of taking a domicile anywhere, the liberty of trade and industry, etc., are guaranteed not only for intercantonal relations, but generally, *viz.*, also for intercommunal relations. But if we look at these provisions of the Federal Constitution from the point of view of historical development, it is evident that Federal law points above all at an equal treatment of all Swiss citizens inside and outside their native Cantons.

In the following notes no thorough and complete investigation into the Federal law relating to interstate relations nor into the autonomous or conventional practice of Cantons is aimed at, but only a general survey of the most important matters of interstate concern.

a. Nationality. — Federal law regulates only the naturalization of foreigners, *i. e.*, it prescribes the conditions in which Cantons can naturalize aliens and in which they must recognize anew citizens who have lost personally or through their parents a former allegiance with a Swiss Canton. Besides that the Cantons are competent to regulate at liberty naturalization both of foreigners and of citizens of other Cantons. One important restriction is

laid upon Cantonal legislation — no Canton is allowed to expel from its territory one of its citizens or deprive him of his right of citizenship. If there are people belonging to no Canton the Federal authorities decide definitely which Canton has to recognize them as citizens. Cases of double allegiance to two Cantons are of no legal interest except in questions of intercantonal private law. Conflicts, unavoidable with international *sujets mixtes*, do not exist in intercantonal relations, because the Cantons do not exercise rights over their citizens outside their own territory, and especially because military service is uniformly regulated for all Swiss. The question of cantonal citizenship is not of considerable importance in intercantonal relations, because the Federal Constitution guarantees to the citizens of one Canton domiciled on the territory of another Canton an almost perfectly equal treatment with the citizens of that Canton. The only matter in relation to citizenship which has been settled by a concordat is the "Heimatschein" (certificate of cantonal citizenship); this or an equivalent paper is sufficient for a Swiss to claim freedom of settlement in any place in Switzerland.

b. Different treatment in legislation of cantonal citizens and other Swiss citizens. — The Constitution forbids, in principle, all differential treatment, as has been stated above. However, such differences as are justified by the fact of residence and nonresidence are lawful. But all residents and all nonresidents are respectively to be treated equally; the fact of cantonal citizenship or of allegiance to another Canton is of no influence except in the cases reserved by the Federal Constitution. Some cases of differential treatment formerly general and only restricted by concordats have been explicitly prohibited by the Constitution, viz, the exit duty on property (*traite foraine*) translated from one Canton to another in consequence of emigration or succession, and the right of redemption (preemption) in favor of the citizens of the Canton where the property is situated. These relics of medieval law had already been abolished by interstate conventions since the beginning of the nineteenth century.

If in principle all Swiss are to be treated equally, the same law is not necessarily applied to all. The Constitution provided Federal legislation on the application of private law to persons residing out-

side their native Canton. In 1891 a law was enacted by which domicile is defined and stated in which cases the law of the Canton of origin or the law of the Canton of actual domicile must be applied. This legislation will lose most of its importance when, in 1912, the Federal civil code will be put into force.

c. Prohibition of double taxation. — The prescription concerning the equal treatment of all Swiss citizens excludes differential treatment in taxation, but does not make unlawful that the same value might be taxed twice under two different cantonal legislations. Such double imposition, however, is prohibited by the Constitution, which provides for Federal legislation on this subject. But the two Houses of the Federal Parliament never came to an understanding on the bills introduced. Nevertheless, the constitutional prohibition is applied by the Federal Court and the numberless and elaborate decisions of this court offer a complete system of law relating to double imposition and make a special enactment now superfluous. The prohibition relates only to intercantonal double imposition; not to international and intercommunal conflicts of taxation. These disputes are in principle classed as interstate disputes on public law; however, not the Cantons concerned, but the taxpayer appears in these cases as plaintiff before the Federal Court. Before 1874 the Constitution did not make any provisions about this matter; nevertheless the Federal Council (then competent) decided such cases because they were rightly considered as conflicts between the powers of the states. The prohibition relates only to direct taxation, not to police taxes, taxes on objects of luxury, stamp duties, etc. Taxes on personal property and income, including mortgages, are levied by the Canton of actual domicile; taxes on real property, by the Canton where the estates are situated; income from business, in the Canton where the concern is domiciled.

d. Right of settlement. — Citizenship in Switzerland differs considerably from the law of citizenship in most other countries. It is a cantonal institution, not a Federal one. The Swiss nationality is only a necessary consequence of cantonal citizenship, and this latter is subject to the acquisition of the hereditary membership in a commune of the Canton. This membership, which is acquired by birth

or admission, entitles to unconditional right to take domicile in the commune and to public aid in case of poverty, and in some places to considerable economic advantages derived from the common property of the community. In consequence of these circumstances there are in all communes three classes of inhabitants besides the foreigners — members of the community, other citizens of the Canton being members of other communities, and citizens of other Cantons. Only the first class is in possession of all possible rights; the second class is excluded only from the special rights connected with communal membership, because they enjoy these rights in the community where they are members. The third class can not claim more rights than the Federal Constitution prescribes as a minimum.

Every Swiss, whatever his citizenship may be, has the right to settle in any commune in Switzerland on the only condition of submitting a certificate of citizenship. Settlement can be refused or withdrawn from those who, in consequence of penal conviction, are deprived of their civil rights. Settlement may also be withdrawn (but not refused beforehand) from those who have been repeatedly punished for serious offenses or who permanently come upon the charge of public charity, if the commune or the Canton of origin refuse to grant sufficient relief to the Canton or commune of domicile. Expulsion on account of poverty by the commune of domicile must be approved by the cantonal government and notified to the government of the Canton to which the expelled pauper belongs. Special provisions are in favor of indigent persons who fall ill or die outside their Canton of origin. The constitutional prescriptions relate only to persons who have settled in a commune; not to temporary residents. As heretofore the two Houses of the Federal Assembly could not agree upon bills regulating this matter, the legislation on temporary residents is still within the powers of the Cantons, considerably limited indeed by the general prescriptions of the Constitution. There exist some concordats concerning the police of non-resident people.

The Cantons and communes of domicile can not require from the settlers securities or levy on them special or higher taxes than from their own citizens and members. Cantonal laws and regulations relating to settlement and the right of vote in communal affairs must

be submitted for approval to the Federal Council. The maximum of chancery taxes to be paid by the settlers is prescribed by Federal law.

Swiss citizens who have settled outside their Canton or commune of origin are admitted to the exercise of political rights on the following conditions, which represent the minimum of rights to be granted by the Cantons: In Federal elections and plebiscites the settler is entitled to vote as soon as he has submitted his certificate of origin. In cantonal and communal affairs he enjoys, after three months of residence, the same rights as the citizens of the Canton with the exception of participation in property of the community of communal citizens or other corporations and the right of vote in matters relating especially to the community of communal citizens (administration of the estates of the community, admission of new communal citizens, etc.).

e. Freedom of trade and industry. — The freedom of trade and industry, which is in close relation with the right of settlement, is guaranteed by the Federal Constitution without reference to interstate conditions. Among the restrictions to which this liberty is subjected there is one of intercantonal bearing. The Cantons may require proofs of competency from those who desire to exercise liberal professions. Federal legislation provided only for certain professions, such as physicians' and surgeons' uniform Federal examinations and certificates. In other professions the Cantons may make regulations as they think fit. It is recognized not to be contrary to the Constitution if for certain professions other than liberal certificates of competency are required, *e. g.*, for surveyors, midwives, etc. There exist some concordats and reciprocity agreements on such subjects. The concordat for the admission of reformed ministers in the state churches extends the liberty of exercising a profession to a class of state officers.

f. Civil justice. — Before civil law had been codified by Federal legislation the Cantons could agree upon uniform rules on private law. They did that only to a very limited extent. Intercantonal collisions of statutes, formerly the object of different concordats, are now settled by Federal legislation.

As for the law of procedure in civil cases the Federal Constitution

contains some very important provisions. Legislation on the organization of courts of justice and their procedure is, as far as Federal justice is not concerned, left to the Cantons. This power was expressly reserved when by the constitutional amendment of 1898 the Confederation was given the unrestricted power of legislation in civil and criminal law. The difficulties which might flow from the independence of Cantons as to courts and proceedings are in the main made impossible by two prescriptions of the Constitution — the principle of *forum domicilii* and the execution of all definitely pronounced civil judgments in each Canton.

The right of the solvent debtor, who has a domicile in Switzerland, of being sued for personal claims before the judge of his domicile is one of the most ancient rules of Swiss law and was recognized already in the league of 1291 and more distinctly in the interstate treaty of 1370 (priest charter). The *forum domicilii* is prescribed by Federal law only for personal claims relating to private law. For claims concerning real estate there is no Federal rule, but it is recognized that in such cases the judge of the *res sita* is competent. For cases concerning the personal status, family, and succession law the Federal law on the civil relations of people domiciled outside the Canton of origin has made no special provision.

In consequence of the principle of *forum domicilii* the property of a sued debtor situated outside the Canton of domicile can not be attached for personal claims. If the judge of the domicile has given his sentence, the sentence is to be executed also in any other Canton, but real estate creates no domicile for claims not relating to that estate. Seizure of property in order to secure the execution of legally pronounced sentences is regulated by the Federal law on bankruptcy and legal collection of debts.

The right of *forum domicilii* is of an exclusively intestate character and does not apply to the interior judicial organization of Cantons.

The second important prescription of the Constitution, which relates to civil proceedings, is as follows: Civil judgments definitely pronounced in any Canton may be executed anywhere in Switzerland. The rule covers only civil judgments — not those of a public character as, *f. i.*, decrees of taxation. The Constitution does

not forbid that the Cantons by agreements of reciprocity or concordats establish rules securing the execution of judgments on more favorable conditions and a more extensive basis. The Constitution prescribes only the minimum. Federal law does not regulate the form in which execution is requested and granted. For want of Federal and interstate conventional rules the general rules of international law are applied.

A concordat relating to civil proceedings has been recently concluded in order to exempt Swiss plaintiffs, having no domicile in the Canton where they sue the defendant, from being compelled to give a *cautio judicatum solvi*, if such security is not required from the inhabitants.

g. Criminal justice. — Extradition of fugitive criminals has always been granted between Swiss Cantons and formed a part of the common law of the old leagues. The Mediation Constitution pronounced formally the principle which was since 1809 developed in different concordats. The concordat of 1809 is still in force in a very limited degree. The Federal law on extradition, which was enacted in 1852 and revised in 1867 and 1872, has superseded almost entirely the law of the concordats. Federal law is incomplete and makes extradition obligatory only for enumerated cases. Extradition can not be made compulsory by Federal legislation for political crimes and crimes committed by means of the printing press.

A Canton is not obliged to deliver to another Canton its own inhabitants (not only citizens) on the condition of punishing them by its own courts.

The prescriptions of Federal law contain only the minimum; the Cantons are free to grant extradition also in other cases and so they do, mostly on the basis of reciprocity agreements. Therefore, the incompleteness of the Federal law does not cause serious disadvantages. By concordats extradition has been extended to police cases and even execution has been secured by a particular concordat.

The Federal law on extradition makes also provisions for the cooperation of the criminal authorities of different Cantons. They are obliged to make, at the request of officers of another Canton, investigations and hear witnesses.

Commissions of inquiry and extradition are to be effected without charge.

h. Various matters. — The above-mentioned matters are those which are of greatest interest not only in interstate but also in international relations. It would be almost impossible to state all cases in which interstate relations exist or at least are possible. Some matters of high importance in international law are on account of Federal institutions beyond the reach of interstate law — import and export, railways, telegraph. In other matters the space left to interstate law is narrow or large according to the extent of Federal powers and law. But even on subjects within the power of the Cantons these have in most cases made no regulations of an interstate character.

Concordats and other intercantonal treaties have been concluded on the following subjects, not mentioned above: Control of vagrant and other dangerous people, passports, transportation of surrendered criminals and of destitute people sent to the commune of origin, collections for pious and similar institutions, traffic of motor cars and bicycles, official register of medicaments, control of patent medicines, extinction of insects noxious to agriculture (May bugs, etc.), protection of young people abroad, relations of vicinage, exercise of patented professions in frontier districts, mortgages on estates divided by intercantonal boundaries, taxation of real estate in boundary districts, navigation police and fisheries in intercantonal waters, etc.

A concordat of great importance is the treaty of Langenthal of 1828, by which the Cantons of Lucerne, Berne, Soleure, and Zug (Argovie, Thurgovie, and Basle adhered later) created a common Roman Catholic bishopric of Basle, since in the period of the revolution the ecclesiastical organization of Switzerland had undergone fundamental changes.

The catalogue of concordats could easily be continued and still to-day new concordats, either of particular or general character, are concluded when the interests of Cantons require a definite and legal regulation of certain interstate relations or if Federal legislation seems to be impracticable at this time.

MAX HUBER.

THE ORIGIN OF THE CONGO FREE STATE, CON- SIDERED FROM THE STANDPOINT OF INTERNATIONAL LAW

The partition of Africa, which the present generation has seen accomplished, has yielded a generous by-product in international law. Protectorates, spheres of influence, hinterlands, the position of savage and semicivilized tribes, nominal and effective possession, territorial leases — these are but a few of the topics to which the political apportionment of the Dark Continent has drawn attention and exacted serious consideration. For more than twenty years the position of one of the largest holders of African territory, the Congo Free State, has aroused much discussion. With the serious accusations against Congolese administration press, pulpit, and platform have made the English-speaking peoples familiar. How far these have been proved it is not a part of the present paper to decide. It is enough for our purpose to say that charges of maladministration have been made in the official publications of more than one country, and that protests based upon them have been presented to those responsible for the direction of the State's affairs. No doubt the criticisms of the past few years have tended to hasten the annexation of the Congo, before which Belgium had previously faltered. Leaving aside the details of the annexation, important as they are from another point of view, the change means the substitution of a responsible government for the Congo in place of the former absolute control by a king-sovereign, who for some years had been able, thanks to the mutual jealousies of the powers, to govern as he chose, whatever might have been the limitations upon his activities which treaties had sought to impose. The coercive power of ultranational public opinion, upon which in the last analysis international law depends, has been plainly evident in the case of the Congo State. Public sentiment, transcending national boundaries, has demanded a responsible government for the Congo. It has accomplished prac-

tically all that the concerted action of the powers might have sought to do.

With the annexation of the Congo to Belgium will appear a new relationship — that of a neutralized state holding a colony within neutralized territory. Belgium will succeed, as the acknowledged owner of the Congo, to those conditions to which the Independent State of the Congo was subject. These appear in the various conventions and agreements to which the Congo Free State and its juristic predecessor, the International Association of the Congo, have been a party. The Congo Free State had treaty relations with the principal countries of the globe, the obligations of which Belgium must, of course, assume. Beyond this the Congo State had either signed or adhered to the General Acts of Berlin (February 26, 1885) and Brussels (July 2, 1890), as well as the Convention of Brussels of June 8, 1899.¹ In other words, the Congo Free State has been treated as sovereign and independent during nearly a quarter of a century. As it passes out of existence it is pertinent to review the peculiar conditions of its origin, viewed from the standpoint of international law. As the annexation to Belgium is now (November 15) an accomplished fact, this subject may be approached without propagandist bias.

No part of the larger Congo question has evoked more spirited discussion than this of the origin of the State. How and when did it come into existence? It was created by the powers in 1885, said some. It was a *de facto* state before the powers met in conference at Berlin, said others. It is easy to see why these two antagonistic theories have been advanced. Those who have wanted the powers to "do something" for the natives have insisted that the State was the creation of the powers. Those who sought to defend Leopold's administration elected to regard the Congo State as having had a *de facto* existence prior to the Berlin Conference. This was done in order to support the view that the Congo State, in adhering to the Berlin General Act, did so as an existing sovereign state, yielding no more than did any other signatory — France or Germany, say —

¹ The texts of these treaties will be found in the Supplement to this number of the JOURNAL, at pages 7, 27, and 70.

which had territories affected by the terms of that act. Those who desired the Congo reformed through international action adopted the theory that a state may be called into being by the fiat or mandate of the existing powers. Those who have exalted the independence of the State have rested upon the familiar doctrine that recognition is but a statement of what at the time appears to be the fact.

The existence of the sovereign state is independent of its recognition by other states. This recognition is the statement of a *fait accompli*, and is also the approbation of it. It is the legitimation of a situation of fact, which is henceforth founded upon law. It is the attestation of the confidence which the states have of the stability of the new order of things.²

These words of the distinguished Belgian jurist correctly state the modern rule. Any other position logically leads to intervention on the part of the recognizing state. It is applicable when a state has been formed out of another state, or of parts of another state or states. But in the case of the Congo it is submitted that the rule does not apply. There was no *de facto* state in the Congo basin in 1884, and no one then claimed that there was. It was at that time the theory neither of the powers which recognized the State, nor of Leopold who founded it. This claim of an antecedent *de facto* existence does not appear until after the Berlin Conference, and then as a matter not wholly free from doubt.³

Those who maintain the State's antecedent *de facto* existence rest their case upon (1) the cessions made to the predecessor of the Free State, the International Association of the Congo, of political sovereignty by the native African chiefs; or (2) upon rights growing out

² Rivier, *Les Principes du Droit des Gens*, I, 57.

³ This position is most strongly stated by Cattier (*Droit et Administration de l'Etat Independant du Congo*, Bruxelles, 1898), who denies that sovereignty was obtained either through recognition by the powers or through the treaties made at an earlier time with the native African chiefs (p. 43). Cf. Banning, *Le Partage Politique de l'Afrique* (Bruxelles, 1898). M. Rolin-Jacquemyns denied that the Congo State owed, or could owe, its existence to an assembly of diplomats, but elsewhere (*Rev. de Droit Int.*, 1889, 170) he seems to take the opposite view. Liberia is an apparent, rather than real, exception to the doctrine stated in the text.

of the occupation of territory *sans maître*; or (3) upon continuous and effective territorial possession *animo imperii*, following the cession of alleged sovereignty by the native tribes. As to the first of these, much of the discussion has shown a confusion of ideas as to territorial sovereignty and property, between *imperium* and *dominium*.⁴ No one within recent times would seriously maintain that *imperium* could be conveyed without any subsequent act or series of acts. As to the second, the occupation of territory *rei nullius*, the modern position is less clear. To deny that savage or semicivilized tribes have any place in international law shocks the modern conscience. It furnishes a basis for the doctrine that such peoples have no rights which civilized nations need respect.

Few would go as far as this, but would admit that while such tribes are not persons in international law (government being the test of civilization), yet they have moral rights as against such persons. There is always a danger of importing the idea of sovereignty into what are really matters of occupation and possession.⁵ It is to the third of the positions cited to which attention must be directed in order to decide the question as to whether the Congo State had an existence before the Berlin Conference, or, to be exact, prior to November 8, 1884, when its predecessor was recognized as a state by Germany. As this is a question of fact it is necessary to review the series of events which led up to the Berlin Conference. These group themselves into two classes: First, as to the origin and development of the idea of which the Congo Free State was the realization; and, second, as to the actions of the powers in 1884 looking to the partition of Africa, and in reference to the above idea. Finally, there is to be considered the theory as to the existence of the State held by its founder, Leopold.

I. The interest of Leopold II, King of the Belgians, in African affairs has been constant since September, 1876, when at his invitation forty or more prominent European scientists, statesmen, and publicists assembled at Brussels for the purpose "of discussing and

⁴ Cf. Westlake, Chapters on the Principles of International Law, IX.

⁵ Sir John MacDonnell, Occupation and Res Nullius, Jour. Comp. Leg. 1893, 277-286.

defining the ways to be followed and the methods to be used in order definitely to plant the standard of civilization upon the soil of central Africa." Leopold declared that he had no selfish or ulterior aim, and, although it has been charged that at this early date, when there was no exact geographical knowledge of central Africa, he had colonial aspirations for Belgium,⁶ there seems to be no conclusive evidence to prove the assertion. This conference resulted in the organization known as *L'Association Internationale pour l'Exploration et la Civilisation de l'Afrique Centrale*,⁷ or, shortly, *L'Association Internationale Africaine*. It had at the outset three objects: First, to explore scientifically the unknown parts of Africa; second, to facilitate the opening of roads by which civilization might be introduced into central Africa; and, third, to find means of suppressing the negro slave trade in Africa. The methods for the attainment of these objects were (1) an organization "upon one common international plan" for the exploration of Africa from ocean to ocean and from the Zambesi to the Soudan, and (2) the establishment of scientific and relief stations within this territory. Both of the objects were, therefore, scientific and humanitarian. The methods were to be international, *i. e.*, distinctly nonpolitical. An important and perhaps significant action was the adoption of a flag to cover the proposed expeditions and the stations to be established. At the time this flag was to have a status, if possible, like that of the Red Cross.⁷ An international commission was instituted which held a meeting in June, 1877, to formulate further plans. In addition to various national committees of the association there was to be an executive committee, resident at Brussels, under the immediate direction of Leopold, to which the several national committees were to send funds for the prosecution of the work. After the session of June, 1877, the International Commission seems to have done nothing. The various national committees had little or no vitality at any time. What activity Leopold's interest aroused outside of Belgium took the form of national or private expeditions. The Belgian committee, however, energized by Leopold, sent an expedition to Tan-

⁶ Keltie, *The Partition of Africa* (1st ed.), 119.

⁷ E. Banning, *Africa and the Brussels Conference*, London, 1877, 155.

ganyika, which had few results, geographical or otherwise. It served, however, to give continuity to the organization and to perpetuate the name of the association. Even that would probably have remained a doubtful asset had not Henry M. Stanley returned from Africa in January, 1878, with exuberant accounts of the commercial value of the Congo basin. When Stanley landed at Marseilles two agents of Leopold sounded him upon undertaking an expedition to the regions which he had just quitted. In the year following a new organization was formed at Brussels by certain of the members of the former executive committee, to whom were added several financiers. This new group, under the name of the Comité d'Études du Haut Congo, while apparently distinct from the earlier one, was really identical with it in management. It entered into an agreement with Stanley, the exact terms of which have never been made clear. Stanley left Europe for the Congo upon an expedition financed by the new association, which soon changed its name to "L'Association Internationale du Congo."⁸ Under all these names the directing authority was King Leopold. Although somewhat disguised, the purpose of the supporters of the Stanley expedition was commercial. With the commercial idea was the embryo, very soon

⁸ It is true that the Comité d'Études was organized as a "société en participation" November 28, 1878, with a capital of one million francs. This sum was soon exhausted in the prosecution of the Stanley expedition, and thereafter the necessary funds were supplied by Leopold. The first appearance of the International Association of the Congo is variously stated. Wauters (*L'État Indépendant du Congo*, 23) says that the comité changed its name at the end of 1883; Chapeaux (*Le Congo*, 322), that the comité "took the title" of International Association of the Congo in 1882, as does Vermeersch (*La Question Congolaise*, 12). Boulger (*The Congo State*, 26) gives no date, but states that the comité "soon" changed its name. Cattier (*op. cit.*, 19), on the other hand, definitely states that the comité ceased to exist during Stanley's expedition. Leopold's motives for assuming a new name for his work Cattier conjectures to have been based upon the apparent utility "of introducing the word *international*" and of renewing the appearance of internationality with which the earlier African association had been invested. As late as 1884 treaties with the chiefs were still being made in the name of the old International African Association. "Au fond, le nom ne faisait rien. Il designait toujours le même pensée, le même volonté creatrice (Vermeersch, *op. cit.*, 12.)" But when the will became political, the adjective "international" was reassumed. The Belgian Constitution then barred the way to accession of territory.

developed, of political power. The president of the International Association of the Congo (under which title Leopold's undertaking was known until the close of the Berlin Conference) thus directed Stanley at the outset of his work:

It would be wise to extend the influence of the stations [to be established in the Congo basin] to the chiefs and tribes dwelling near them, of whom a republican confederation of free negroes might be formed, such confederation to be independent, except that the King, to whom its conception was due, reserves the right to appoint the president, who should reside in Europe.

To this it was added that Leopold's purpose was to create, "not a Belgian colony, but a powerful negro state." Stanley replied that he understood that there was no intention of founding a Belgian colony, but that the alternative would be far more difficult. "It would be madness for me to attempt it except in so far as one course might follow another in the natural sequence of things."⁹ Between 1879 and 1883 Stanley established several stations on the Congo and had negotiated more than three hundred treaties with the native chiefs.

How far these treaties conferred sovereign rights upon Stanley's principals must be decided by the peculiar, if not unique, circumstances of the case. Had Stanley been acting, for instance, on behalf of an African company chartered under British law, no one would have contended that the British flag did not cover the territories thus sought to be obtained.¹⁰ But Stanley and his associates were not then acting for any company, the creation of Belgian or other municipal law. Had the International Association of the Congo been created by Belgian law, it is probable that Belgium, as against other states, might have acquired *imperium* over the territories which the association, as such Belgian subject, might have obtained. She could not have done so as a matter of domestic law, for the Belgian Constitution at that time forbade the cession, exchange, or addition of territory save by special law.¹¹ It may well be that the association

⁹ The Congo and the Founding of its Free State,

¹⁰ Cf. the treaty between the British South African Company and Umtassa, September 14, 1890, quoted by Westlake, *op. cit.*, 151.

¹¹ Article 68 of the Constitution, as revised in 1893, reads: "The colonies,

remained "international," i. e., having no legal status in Belgium, for the purpose of avoiding the restrictions of the Constitution. As it was a private association merely, certain jurists have sought to prove that individuals can acquire sovereign rights by cession from the heads of quasi-states who possess these rights.¹² The precedents cited for this position, viz, the Puritans in New England, the Quakers in Pennsylvania, the British chartered companies in Africa and Borneo, are not in point. In these cases the individuals or companies acquired *dominium*; the *imperium* belonged to the state to which the individuals or companies owed political allegiance, provided, of course, such state ratified, or acquiesced in, the acts of its nationals. Had the African tribes really been members of international society, and hence subjects of international law, the case might have been different. It is idle to hold that sovereignty may be transferred by those who have no conception of it. Stanley's treaties were evidence that the natives had certain moral, if not internationally legal, rights; and the International Association of the Congo recognized that they had.

Did the International Association constitute a state *de facto*, in the sense that a recognition of its *de facto* existence would, or should, follow in the ordinary course of diplomatic action? A state must have territory, a numerous population, and be politically organized. It must have independence and permanence.

For all purposes of international law, a state may be defined to be a people permanently occupying a fixed territory, bound together by common laws, habits, and customs, into one body politic, exercising through the medium of an organized government independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other countries of the globe.¹³

Judged by this standard of Phillimore, it can not be seriously contended that the International Association was a state *de facto*.

foreign possessions, or protectorates, such as may be acquired by Belgium, are to be ruled by special laws. Belgian troops for the defense of these can only be recruited by voluntary enlistment." Bull. de la Soc. de Leg. Comp., 1893, 611.

¹² Notably, Twiss and Arntz in Rev. de Droit Int., 1883-4.

¹³ Phillimore, International Law, 3d ed., I, 81.

In 1884 its territorial claims were large; it comprised the territory south of the Congo and drained by that river and its affluents. But up to the time of the Berlin Conference there had been no delimitation of its territories. Its population was numerous, it is true, having been estimated at from eleven to thirty millions. But these were the blacks, subject to their own primitive rule of life, dwelling in more or less settled fashion in tribal organizations, just as they had for centuries. Of the whites there were at this time about two hundred and fifty, nearly all of whom were in the service of the association. How many of the blacks were conscious of the existence of the alleged sovereign authority of the association, there is no evidence. Later events lead one to think that they were few. Some of these were tribes which resisted, more or less successfully, all exercise of that authority. Outside the small spheres of the various stations, no actual control over the natives was at first attempted. The association was not even able at all times to maintain uninterrupted communication among its stations. What organization there was for the purpose of enforcing the sovereign will, or of political administration, was the company of two hundred and fifty whites, one white person for each one hundred thousand or so of blacks. Nor was the association in any wise "self-contained." It was directed from Brussels and sustained out of Leopold's private purse. Even as to the whites there is nothing to show that they were bound by any tie of political allegiance to the association. Each servant or officer was recruited for a certain number of years' service. It has never been contended that any of the Belgians in its service foreswore allegiance to Belgium, substituting therefor an allegiance to the International Association of the Congo.¹⁴

If the International Association of the Congo was not a sovereign state *de facto* in 1884, what, then, was its status? The most striking characteristic of the organization was its artificiality. Leopold was called the founder (*fondateur*) of the association. Consciously or not, there is imported the idea of an artificial juristic person, the "foundation" of the civil law. The foundation may have scientific

¹⁴ Naturalization in the Congo Free State was established in 1892 by a decree of Leopold of December 27 of that year. Lycops, *Les Codes Congolais*, 161.

or charitable purposes, as well as religious.¹⁵ Note that only the idea was imported, for the association denied that it was the creation of Belgian or other municipal law.¹⁶

The International African Association was, potentially at least, such an "ideal juristic person" when it proposed to found scientific and relief stations in Africa. Later, when the International Association of the Congo took its place, there appears the idea of a corporation, having at first commercial and finally political aims. Its character as an inchoate, or as a potential, corporation is of prime importance in connection with the question of recognition. Had it been a corporation organized under the municipal law of any state, its territories might have "belonged" to that state. Recognition gave it a *locus standi*, absolutely necessary owing to the unique and anomalous circumstances of its origin. The association by no test of international law was a state *de facto*. It was an association without legal standing. To have had a charter under Belgian law would have defeated the very ends of the association. The powers gave to the inchoate organization what otherwise it could not have had. In lieu of *de facto* existence, it was called into being *de jure* by the powers, which recognized it in 1884-85. They made it, or, more correctly, they agreed to consider it, a legal entity — a person, not in municipal law (for such it was not), but in international law. It does not greatly stretch the meaning of the term to call it an international legal fiction. Therefore, when the representatives of the powers welcomed at Berlin the appearance of the new State, there was what M. Rolin-Jacquemyns called, by no mere figure of speech, "an international investiture."¹⁷

II. Whether led by the belief that Leopold was doing his work for the benefit of England,¹⁸ or in order to check the growing colonial power of France, Lord Granville found himself the center of attack when he signed the Anglo-Portuguese treaty of February 26, 1884.

¹⁵ Savigny, *Traité du Droit Romain*, II, 237. Cf. Cuq, *Les Institutions juridiques des Romains*, II, 794.

¹⁶ Note the apparent exception of the Comité d'Études described above.

¹⁷ *Rev. de Droit Int.*, 1889, p. 170.

¹⁸ Keltie, *The Partition of Africa*, 1st ed., 143, who quotes an unnamed source for the statement.

The date may be taken as the *terminus a quo* of the really political significance of the Congo project. This treaty recognized the hitherto shadowy title of Portugal to that part of the African west coast through which the Congo River debouches, between 5° 12' and 8° south latitude. This *volte-face* on the part of Great Britain, which had previously denied Portugal's claims, was denounced by the British press and in Parliament. Leopold appealed to Granville to wait before acting, in order to inquire into the validity of the treaties between Stanley and the native chiefs.¹⁹ More important still were the protests of the continental powers. France declared that she would not be bound by the treaty (March 13). Germany served a like notice (April 18).²⁰ The Anglo-Portuguese treaty, therefore, allowed France and Germany to make common cause against the power which would have deprived Leopold of an outlet from his territories. While Great Britain and Portugal had agreed upon a joint commission for the Congo River, Germany and France came forward with a proposition for an international commission for the river, such as had been considered some time before by the Institute of International Law. These two Powers were drawn into an *entente* by which Leopold would surely be the gainer. On the 23d of April France had a further and tangible interest in favoring the International Association of the Congo. By an interchange of notes between Strauch, the president of the association, and Ferry, the French Minister for Foreign Affairs, the association engaged (1) never to cede its possessions to any power, and (2) to give France the right of preference (*droit de préférence*) in case the association were ever forced to alienate them (*réaliser ses possessions*). As a *quid pro quo*, France agreed "to respect the stations and free territories [*sic*] of the association, and to put no obstacle upon the exercise of its rights (*de ne pas mettre obstacle à l'exercice de ses droits*)."²¹

¹⁹ Boulger, *The Congo State*, 42.

²⁰ Cattier, *op. cit.*, 25, makes the unsupported assertion that Holland and the United States also protested.

²¹ Van Ortruy, *Conventions internationales concernant l'Afrique*, 98. See also Supplement to this JOURNAL. This right of preference in favor of France gave rise to many complications. France announced her right by a circular to the powers (April 23-24, 1884), and, so far as known, none protested. The Congo Associa-

It was by no mere coincidence that just at this juncture the United States recognized the flag of the International African Association, carried by the Congo Association, as "that of a friendly government." Leopold, acting through Mr. Henry S. Sanford, a former minister of the United States to Belgium and member of the old Comité d'Études, managed to obtain from Secretary Frelinghuysen that which Ferry was unwilling to concede, for the French note stopped short of recognition. It was then an open secret in Europe that Leopold had unsuccessfully requested more than one government to recognize the association. The action of the United States came as a distinct surprise, especially in England. The importance of the action of the United States has, however, been overestimated. The movement of forces had already started, the result of which was to give Leopold's work an international status. It was valuable to Leopold in making a precedent, but it does not appear that it materially changed the position of the association. Frelinghuysen signed and the Senate ratified quickly and perhaps without knowledge of the motives which lay back of the request for recognition. The phraseology of this correspondence between Sanford and Frelinghuysen is noteworthy. The association declared that by treaties "with the legitimate sovereigns" there had been ceded to it "territory for the use and benefit of free states, established and being established, * * * to which cession the said free states [*sic*] of right succeed." Free entry of goods into these territories was guaranteed, as well as the right of foreigners to carry on trade there. The United States, sympathizing with and approving "the humane and benevolent purposes of the International Association of the Congo, administering as it does the interests of the Free States there established," recognized the flag as that of a friendly government.

tion ratified the right after its full recognition by France (February 5, 1885). As no exception was made it was feared that France would oppose its right as against Belgium in case the latter State desired to annex the Congo. The question was left open by an interchange of notes between France and the Congo in 1887. By the Franco-Belgian treaty of 1895 the right was confirmed. Although annexation did not then take place, the treaty served to interpret the right: that it would not take priority over Belgium, but that as to other powers both the Congo and Belgium admitted its force.

A few days before the exchange of these notes Bismarck suggested to Ferry that France join Germany in calling a conference of the powers in order to solve the difficulties to which the rival claims to the center of the continent had given rise. To this Ferry consented. In June Bismarck stated in the Reichstag that the enterprise of Leopold had for its object the establishment of an independent state, and, further, that the German Government was favorable to that project. Three days later Granville announced that the Portuguese treaty had been abandoned.²² The plan of Bismarck, as tentatively put forth, took definite form in September, when France and Germany decided to recognize the association as independent. After outlining the program of the proposed conference, to which Great Britain had by this time agreed, Bismarck stated that Germany would take a friendly attitude with respect to the "Belgian enterprise" on the Congo, as a consequence of the desire of his Government to assure to its nationals freedom of commerce over the whole extent of the "future state of the Congo."

At the time, therefore, when the program of the Berlin African conference had been formulated, it appears that (1) France, Germany, and Great Britain acted upon the assumption that the International Association of the Congo was not a state *in esse*, but a possible state *in futuro*; and (2) that within a few days of the conference at Berlin no power had recognized the association, except the United States, whose recognition, so unique in form and substance, was a sort of collateral incident.

The purpose of Bismarck in calling the conference was to have the powers come to an understanding concerning the Congo basin, in order that this core of the African continent should not be fought over by the rival claimants to territory. France, Great Britain, Germany, and Portugal looked, as colonial powers, toward the center of the continent. With the basin of the Congo unappropriated except by the group of private individuals supported by Leopold, acting privately, a scramble, unseemly if not belligerent, might have engaged those states whose colonial aspirations were leading them thither. To recognize the International Association of the Congo

²² Wauters, *L'État Indépendant du Congo*, 30.

as a legal person, having sovereign power over this region, was Bismarck's method of eliminating a dangerous contest for possession.²³ To subject the area to a régime of commercial freedom was to effect what afterwards came to be known as the "open door." To safeguard this freedom, he further proposed that the territories be neutralized. The invitations said nothing about the International Association. The powers were asked into a conference to come to an agreement upon the questions (1) of freedom of commerce in the basin and at the mouth of the Congo, (2) of applying to the Congo and Niger rivers the principles governing the Danube and other international rivers, and (3) of defining the formalities to be observed in order that new occupations on the coast of Africa might be considered effective. These invitations were sent to the various governments of Europe, whether colonial powers in Africa or not. The United States was also asked to send representatives. Many reasons have been given for this inclusion. The conference was said to be commercial and not political in scope; the United States had already recognized the association and had therefore a friendly interest in the matter. No sufficient reason is to be seen why the United States accepted the invitation, as it had nothing to gain by taking part in the conference. Its representatives, however, rendered Leopold valuable services, for assisting the principal delegate, Mr. Kasson, then minister to Germany, were Henry M. Stanley ("nominally as a geographical expert, but in reality there to look after the interests of his patron, the King of the Belgians")²⁴, and Mr. Henry S. Sanford, who had already been conspicuous in behalf of Leopold's enterprise.

The representatives of the powers met at Berlin November 15, 1884. On the 8th Germany and the Congo Association signed a convention of friendship and limits. The terms of this document are significant as compared with those used by the United States in the preceding April. Although the flag was recognized as that

²³ And to check English influence over Portuguese Africa.

²⁴ Keltie, *The Partition of Africa*, 1st ed., 207. The General Act of Berlin, signed by the American delegates, was not submitted to the Senate for ratification by President Cleveland.

of a friendly state ("d'un État ami," "eines befreundeten Staates"), yet this follows immediately:

The German Empire is, on its part, ready to recognize the frontiers of the territory of the association and of the new state to be created (du nouvel État à créer, des zu errichtenden Staates) as they are indicated upon the annexed map.

While the conference collectively deliberated, each of the powers (with the exception of Turkey), acting by itself through its representatives at Berlin, recognized the Congo Association, Great Britain being the first after Germany (December 16), followed by Italy (December 19), Austria (December 24), the Netherlands (December 27), and Spain (January 7, 1885). France signed a treaty of limits after a long correspondence (February 5), as did Portugal (February 14). The other powers then followed in recognition in the following order: Russia (February 5), Norway and Sweden (February 14), Denmark (February 23), and finally Belgium (February 23) on the last day of the conference, when the Final Act was signed. It is to be noted that as an expression of the opinions then held by the recognizing governments as to the existing régime upon the Congo each reserved consular jurisdiction.

Following this several recognition, the International Association of the Congo was introduced to the conference as adhering to the terms of the General Act. This introduction came by way of a letter from President Strauch in which he called attention to the accession of a power ("l'avènement d'un pouvoir") which had for its single mission the introduction of civilization and commerce into central Africa. Addresses of congratulation by the various representatives followed. In them may be further seen the theory held as to the origin of the State. Baron de Courcel, for France, referred to it as a state "territorially constituted to-day with exact limits." Sir Edward Malet expressed the satisfaction with which his Government witnessed the founding of this new State. "We salute the new-born State." Count van der Straten Ponthoz spoke for Belgium: "Thanks to the conference the existence of the new State is henceforth assured." In the same vein was Bismarck's greeting. "I believe," said he, "that I express the views of this conference when

I acknowledge with satisfaction the steps taken by the International Association of the Congo in acknowledging its adhesion to our decisions. The new Congo State is called upon to become one of the chief protectors of the work which we have in view. * * *

The inchoate corporation was now a juridical entity and a political person. The new State was henceforth a member of the family of nations. To quote Rivier: "Le nasciturus etait né."

Like Homunculus:

Er ist. . . .

Gar wundersam nur halb zur Welt gekommen.

Ihm fehlt es nicht an geistigen Eigenschaften,

Doch gar zu sehr am greiflich Tüchtighaften.²⁵

It is impossible within the limits of the present paper to enter into detail as to the results of the Berlin Conference as embodied in its General Act. The scope of the meeting was broader than Bismarck had originally suggested. Certain parts of the General Act refer particularly to the régime for the Congo, though nowhere is the Congo Association mentioned. The terms of the General Act are general and affect all territories with the so-called "conventional free-trade zone" as defined by the act. That the conference applied its stipulations to a territory larger than the mere geographical basin of the Congo was due to the initiative of the American representatives. Mr. Kasson suggested that the "commercial basin" of the Congo should be considered, rather than the geographical one. Stanley urged this plan, but was surprised to notice "a curious reluctance to speak, as if there was some grand scheme of state involved."²⁶ A matter of policy was indeed involved, for by adopting the so-called "conventional zone" of the Congo, all powers having territory within it were affected. The provisions of the General Act were thereby made to apply not only to Belgian and French Congo, but practically to all territory between the Atlantic and Indian oceans, from the Zambesi to 5° north latitude on the east, and from 2° 30' north latitude to 80° south latitude on the west. Within this territory there was to be absolute freedom of commerce. No power which exercised rights of sovereignty within the zone was to grant

²⁵ Faust, II, Act II.

²⁶ Stanley, *The Congo*, II, 394.

monopolies or privileges of any kind in commercial matters. The act provided for the protection of the natives:

All powers exercising rights of sovereignty or an influence in the said territories engage themselves to watch over the conservation of the indigenous populations and the amelioration of their moral and material conditions of existence and to strive for the suppression of slavery and especially of the negro slave trade. * * * The right to erect religious edifices and to organize missions belonging to all forms of worship shall not be subjected to any restrictions or hindrance.

Furthermore, a basis for the neutralization of this conventional basin was adopted by the conference. The neutralization was, however, not compulsory or imposed upon the territories within the zone, but it was voluntary as to each colonial power, or, in other words, it was a system of facultative neutralization. The powers did not thereby assume to guarantee such neutrality, but only to respect it after any power had adopted the régime of neutralization. The adoption of the conventional zone, within which the terms of the General Act were to apply to all powers alike, was of decided advantage to Leopold, for it put the new State upon a footing of equality with other states. No more or greater obligation rested upon it than upon any other power having territorial interests within the zone. The recognition of the association was complete and unconditional. It was not half sovereign or dependent, but fully sovereign.

III. There remains to be considered Leopold's theory as to the existence of the Congo State. In the volume entitled "Codes Congolais et Lois usuelles en vigueur au Congo," prepared in 1900 by M. Lycops, clerk to the Superior Council of the Congo Free State, the text of the Berlin General Act and that of the adhesion thereto by the Congo Association appear as the "preliminaries to the constitution of the State." Following these are what M. Lycops calls the "constitution" of the State. This "constitution" consists of a letter from Leopold to the Belgian Council of Ministers and the resolutions of the Belgian Chambers in reference thereto. In the communication Leopold's own theory of the status of his undertaking is seen. This was that the State had not yet been politically organized; *i. e.*, that the State *de facto* did not even then exist.

The work created in Africa by the International Association of the Congo has had a great development. A new State has been founded, its

limits have been determined, and its flag recognized by almost all the powers. There remains to be organized on the banks of the Congo its government and administration.

Leopold then asked that the Belgian Chambers give their consent, necessary under article 62 of the Belgian Constitution,²⁷ for him to assume the headship of the new State, preliminary to the organization of its government and administration.

King of the Belgians, I shall be at the same time sovereign of another State. This State will be independent, like Belgium; and, like her, it will enjoy the benefits of neutrality.

The required assent of the Chambers quickly followed, with the proviso that "the union between Belgium and the new State shall be exclusively personal," that is, that the Congo was to be not an appanage of the King of the Belgians *ex officio*, but of Leopold personally. Of course this was not a constitution in the ordinary acceptance of that term. It was merely the basis upon which the governmental machinery might be organized or constituted. Leopold was not a "constitutional" sovereign, in the sense that his powers were limited by any fundamental law of the State. Unless limited by the terms of the Berlin Act, he became August 1, 1885, the absolute sovereign, or autocrat, of the Congo, controlling absolutely, in theory at least, the inhabitants within the limits marked by the various treaties of delimitation. "The possessions of the International Association of the Congo form henceforth the Independent State of the Congo," Leopold informed the powers in the summer of 1885. At the same time the new State, which by a reversal of the usual order had organized a government after it had been recognized as a state, declared itself perpetually neutral, according to the terms of the Berlin Act. This, as has been suggested, was in no sense a limitation of the State's sovereignty. Nor was any provision of the General Act such a limitation upon sovereignty. The Congo Free State (properly the Independent Congo State, the change of name signifying the change in status), in adhering to the terms of the General Act and in declaring itself neutral, bound itself in no respect

²⁷ ART. 62. The King can not be at the same time chief of another state without the consent of the two Chambers. Neither Chamber can deliberate upon this question unless two-thirds of its members are present, and the resolution shall not be adopted except by a two-thirds vote of each House.

differently than did any state signing the act. It agreed to lay no import duties, to look after the welfare of the natives, to encourage missions, to create no commercial monopolies. So did every other state signing the act. There was no method under the act by which violations of its terms might be enforced. No offending state could be coerced. All of the signatories were sovereign. In such a case, rupture of diplomatic relations, if another state felt itself aggrieved, a new conference, if there was substantial agreement among the signatory powers as to the serious infraction of the act, practically exhaust the remedies.

Freedom from import duties in the conventional zone, while making for commercial freedom, seriously handicapped the Congo Free State in its internal administration by cutting off a large and necessary source of income. In 1890 the representatives of the powers again assembled, this time at Brussels. The ostensible purpose of this meeting was to take further steps for the suppression of the slave trade. Before the Brussels Conference had progressed far, it developed that an attempt would be made to modify the onerous restrictions of the former act in reference to import duties. A provision for limited import duties was after long debate duly incorporated in the Brussels General Act, for the purpose of better enabling the Free State to wipe out the slave trade. In other respects the Berlin Act stands to-day. The impression has been general that the provisions of that act have been violated; that within late years, at least, the natives have been treated with no due regard for their "moral and material amelioration," such as the act prescribed. When charges of violation of the spirit of the Berlin Act were brought against the Congo Free State answer was made either by way of general denial or by a "*tu quoque*" argument, or else that if there had been some necessary disregard of the means of moral or of material regeneration, the State was within its right, as it was sovereign and independent; that as such sovereign and independent state it was the sole judge of the truth or falsity of the charges. Of course there were other answers, but these three groups comprise most of them. The force of public opinion, however, resulted in the appointment of a commission for the investigation of the charges of maladministration. This commission reported upon certain grave

abuses in the form of labor taxes and of unrestricted forced services demanded both by the State and by the State's concessionary companies. Slowly — too slowly for many active reformers — public sentiment became a force which the absolute sovereign of the Congo did not withstand. A new conference which might review the whole question of the condition of the natives in the conventional zone, both within and without the Congo Free State, was declined by certain of the continental powers when Great Britain proposed it in 1903. The only remaining sanction was that of ultranational public opinion. This, voiced in protests by more than one government, was reflected in Belgium. Leopold had as early as 1889 devised the Congo to Belgium. Later he agreed to permit Belgium to annex it if she so desired, after a term of years. After long negotiations between Belgium and Leopold, the Congo Free State now passes out of existence and becomes in fact what it should have been long ago, a Belgian colony. As a colony it will be subject to government by discussion. In that country where party strife is active, where liberal ideas find such ready expression, responsible parliamentary government must surely be a guaranty that the provisions of the Berlin Act will be observed in spirit as well as in letter.

The Congo Free State has been a political if not a financial failure. Why? The answer, it seems, must be plain. States to be worthy of the name are not artificial productions, even when conceived by the master minds of the great chancelleries. When the powers recognized the International Association of the Congo they agreed to consider something as a state which was in truth not a state. However benevolent the intentions of its sponsors might have been, the effects of creating such an institution to be regarded as sovereign and independent were not foreseen. It was the anomalous character in international law of the State which has made the Congo question so difficult of treatment. The Congo State, not being the result of ordinary conditions, could not be judged by ordinary standards. An unnamed diplomat was well within the truth when he described the Congo Free State, soon after it came into being, as "an anomaly and a monstrosity, from an international point of view; and from that of the future, it was an unknown danger."

JESSE S. REEVES.

PURCHASABLE OFFICES IN CEDED TERRITORY

In the July number of the JOURNAL is given the decision of the Court of Claims in *Sanches v. The United States* and of the Supreme Court in *O'Reilly v. Brooke*. Both cases involve the validity of the orders of military governors in former Spanish territory abolishing offices for which a price had been paid and which the holder claimed were private property and thus under the protection of the law of nations and the treaty of peace with Spain. In the *Sanches* case the office abolished was that of "numbered procurador of the courts of first instance of the capital of Porto Rico;" in the *O'Reilly* case the office was that of high sheriff of Havana. In each case the opinion was expressed that the office had ceased with the extinction of Spanish sovereignty, but in the Supreme Court case this was not necessary to the decision, as General Brooke's liability had already been denied on other grounds, while the opinion on this point was delivered without argument of counsel, without exposition, and without the citation of authority other than that of the Secretary of War in approving General Brooke's order. It is the opinion of the writer that the holders of those offices were entitled to indemnification. The facts of the *O'Reilly* controversy will be gone into in considerable detail.

In the year 1728 Don Sebastian Calvo de la Puerta bought at public auction, with the consent of the Spanish Crown, an hereditary and alienable office known as the "alguacil mayor" or high sheriff of Havana. This was a double office — partly national, partly municipal. Its national duties were what gave the office its name and consisted principally in the service of writs. In his national character the high sheriff was an executive officer of the courts. But the patent of his office made him also a perpetual member of the city council of Havana. Connected with the perpetual councilorship apparently, and through it with the double office of high sheriff, was the right to manage and conduct the slaughter of cattle in the public slaughterhouse of Havana and to charge fees therefor. The duties

connected with this right do not seem to have been considered part of the duties of office but rather as incident to the right, which was considered one of the emoluments of the office. When considered as duties of the office, however, they have been classed as municipal and not national. For the service of writs the high sheriff was entitled to fees fixed by law.

By the law for the reorganization of the municipal councils of Cuba of July 27, 1859, it was provided that an investigation should be made as to the proper compensation for the assignable offices in the municipalities, with a view to the abolition of those offices on the payment of the compensation fixed. The office of the "alguacil mayor" of Havana, by reason of its large returns, was to be the subject of special investigation. No final action was taken under this law, however, and the high sheriff continued to be a member of the municipal council until in 1878 the governor-general of Cuba published a decree that the perpetual councilors should cease to perform the duties appertaining to them and should no longer be considered members of the municipal council, but that they should be deprived of no emolument until the proper indemnification provided for by the law of 1859 had been paid. The double office of the high sheriff was affected to the extent that he was a perpetual councilor. Other provision seems to have been made subsequently for the service of writs. At any rate, this latter function seems to have fallen to decay, so that at the time of the American occupation all that was left of the office seems to have been the right to its emoluments, which consisted of the slaughterhouse privilege. That the latter was valuable is shown by the fact that a one-half interest in it was sold on an execution sale in 1895 for \$70,000. Through the extinction of the male line of the purchaser of 1728, the office of high sheriff had passed to Count O'Reilly, the husband of the daughter of the previous high sheriff, and at the time of the American occupation the owner by inheritance was the Countess O'Reilly and Buena Vista. In performing the services connected with the slaughterhouse privileges she then employed seventy workmen, fifty men, and more than twenty carts.

The military occupation of Havana by the American forces oc-

curred January 1, 1899. The treaty of peace had been signed December 10, 1898. Ratifications were exchanged April 11, 1899. Acting on the recommendation of the Havana finance commission, General Ludlow, as governor of Havana, issued an order on May 20, 1899, terminating "the hereditary grant or privilege in connection with service of the city slaughterhouse, of which the O'Reilly family, its grantees or lessees, are now the beneficiaries," directed the city of Havana to make provision for the services in connection with the slaughterhouse, and intimated that the beneficiaries of the old privilege might seek such relief as they were entitled to in the courts. This order was to go into effect June 1. Appeal was taken to General Brooke, military governor of the island of Cuba, who did not confirm the order appealed from, but, instead, issued the following:

It being considered prejudicial to the lawful interests and general welfare of the municipality of Havana, and as a measure demanded by public policy and in harmony with preceding orders of the military government, in view of the condition of affairs created in this island by the cessation of Spanish sovereignty, the old alienated office known as "alguacil mayor de la Habana," together with all rights, duties, and privileges pertaining thereto, or derived therefrom, are hereby abolished, and the right of the claimants to ownership thereof of exercising said office or receiving any of the emoluments, attributes, prerogatives, or any kind of benefit or rights whatsoever that have heretofore been enjoyed therefrom by said claimants to ownership are hereby denied.

The municipal corporation of Havana, therefore, may adopt proper measures and provide the necessary means of performing the municipal services heretofore discharged by the claimants to ownership of said office as attributes, prerogatives, or duties attached to the same.

From this order an appeal was taken to Mr. Root, Secretary of War, who referred the matter to the Hon. Charles E. Magoon, Law Officer of the Division of Insular Affairs of the War Department. The report of Mr. Magoon was unfavorable to the petitioner, and pursuant to that report Mr. Root, December 24, 1900, made the following determination:

I can not assent to the proposition that the right to perform any part of the duties or receive any part of the compensation attached to the office of sheriff of Havana, under Spanish sovereignty, constituted a perpetual franchise which could survive that sovereignty. The fact that the Spanish Crown permitted an office to be inherited or purchased does not

make it any less an office the continuance of which is dependent upon the sovereignty which created it.

The services which the petitioner claims the right to render and exact compensation for are in substance an exercise of the police power of the State. The right to exercise that power under Spanish appointment or authority necessarily terminated when Spanish sovereignty in Cuba ended. It thereupon became the duty of the military governor to make a new provision under which this part of the power of the new sovereignty, which took the place of the sovereignty of Spain, should be exercised and the necessary service rendered to the public. The petitioner has been deprived of no property whatever. The office, right, or privilege which she had acquired by inheritance was in its nature terminable with the termination of the sovereignty on which it depended.

The question whether by reason of anything done before that time the right to compensation from the municipality of Havana has arisen is a question to be determined by the courts of Cuba.

The application for the revocation of the order heretofore made herein by the military governor of Cuba is denied.

Action was then brought in the district court for the southern district of New York against General Brooke on the ground that his order was contrary to the Constitution and laws of the United States and in violation of the provisions of the treaty of Paris and of the instructions of the President of the United States, that it was a confiscation of the plaintiff's property, and was wholly unlawful, tortious, and unauthorized on the part of the defendant, and that it was also in contravention of the Spanish law of 1859 and of the decree of 1878. Judgment was demanded for damages alleged to amount to \$250,000. Nothing was said in the complaint as to the appeal to the Secretary of War. The defendant demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action. Judge Holt, before whom the demurrer was argued, overruled it on the ground that General Brooke's order was not a governmental act; that under the Spanish law the Countess O'Reilly could not be deprived of her rights in this franchise until its value had been determined and paid to her, and that accordingly the facts as stated in the complaint amounted to a tortious interference with private property on the part of the defendant.¹

The case then came to trial, and in defense it was urged that the

¹ 135 Fed. Rep., 384.

abolition of the plaintiff's right or franchise to slaughter cattle in Havana was justified as an act under the police power in the interests of the public health, and that the United States Government having ratified the action of General Brooke in abolishing the plaintiff's franchise, the plaintiff had no longer any claim against General Brooke. The first defense, that the order was an exercise of the police power, Judge Holt refused to allow, but he upheld the second defense, that by the action of the Secretary of War and the ratification provision of the "Platt Amendment" General Brooke's order had been ratified by the Government of the United States, or of Cuba, or of both, and that this relieved General Brooke from liability, and dismissed the complaint. He expressed the opinion, however, that the plaintiff had a just claim for damages against the United States, under its obligations assumed in its treaty with Spain, or against Cuba, under its obligations assumed in its treaty with the United States, or against both Governments.²

The case was then taken up on writ of error to the Supreme Court of the United States, where the opinion was delivered by Mr. Justice Holmes.³ The court said that the plaintiff necessarily assumed that her rights followed the ancient conception of an office and were an incorporeal hereditament, susceptible of disseisin, and asked if such were the case why the disseisin was not complete before General Brooke had anything to do with the matter, or why he should be liable for the continued exclusion of the plaintiff by the United States and Cuba, but that it was hard to admit that the notion of disseisin could be applied to such disembodied rights. If not, that all General Brooke could be held for, if for anything, would be damages for the disturbance to the plaintiff while he was in power, which were not the object of the suit. But, the court continued, if the plaintiff were disseised, it would be a question whether such disseisin was a tort within the meaning of the sixteenth clause of Revised Statutes, section 563, giving the district courts jurisdiction "of all suits brought by an alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States," under which the jurisdiction of the

² 142 Fed. Rep., 858.

³ 209 U. S. 45.

district court had been invoked. Putting aside these questions, the court then proceeded to dispose of the case on its merits, basing its decision on what might be gathered from the pleadings, coupled with matters of general knowledge. Without considering then whether ratification was needed, they held in the first place that "where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States,' it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act." In the second place, they agreed "with the opinion of the Secretary of War that the plaintiff had no property that survived the extinction of the sovereignty of Spain. The emoluments to which she claims a right were merely the incident of an office, and were left in her hands only until the proceedings for condemnation of the office should be completed and she should be paid. The right to the office was the foundation of the right to the emoluments. Whether the office was or was not extinguished in the sense that it could no longer be exercised, the right remained so far that it was to be paid for, and if it had been paid for the right to the emoluments would have ceased. If the rights to the office or to compensation for the loss of it was extinguished, all the plaintiff's rights were at an end. No ground is disclosed in the bill for treating the right to slaughter cattle as having become a hereditament independent of its source. But of course the right to the office or to be paid for it did not exist as against the United States Government, and unless it did the plaintiff's case is at an end." The judgment of the district court was accordingly affirmed.

It will be noticed that the Supreme Court, in following the Secretary of War, held that the right to perform any part of the duties or receive any part of the compensation attached to the office of high sheriff of Havana ceased with the extinction of Spanish sovereignty, but that they did not specify when Spanish sovereignty became extinct. Mr. Magoon, in his report, went further and held that Spanish sovereignty passed away with the American occupation. It will be necessary to examine his position first, as the determination of the Secretary of War was based on his report without citing

authority, and the Supreme Court followed the Secretary of War, likewise without citing authority. Mr. Magoon's first contention was that the authority of complainant to administer the office of high sheriff ceased upon the establishment of the military occupation of Havana. He based this on article 6 of Lieber's Instructions for the Government of Armies of the United States in the Field, which is as follows:

All civil and penal law shall continue to take its usual course in the enemies' places and territories under martial law (military government), unless interrupted or stopped by order of the occupying military power, *but all the functions of the hostile government — legislative, executive, or administrative — whether of a general, provincial, or local character, cease under martial law (military government), or continue only with the sanction or, if deemed necessary, the participation of the occupier or invader.*⁴

Mr. Magoon then goes on to say:

I understand this instruction to mean that it requires an affirmative act of the invader to abrogate the civil or penal laws, but the authority of legislation, execution, and administration of all laws passes to the military occupant as a result of the occupation and without further affirmative act or declaration. Should he thereafter desire to confer the right to exercise any or all of said powers upon the persons previously exercising them, or other persons, an affirmative act is necessary.

From this he concludes that the authority of the claimant passed to the occupier by the fact of occupation, even though it were conceded that the office itself did not become *functus officio* thereby.

It is submitted that this interpretation of the instruction is erroneous. That Dr. Lieber did not intend it is shown by articles 26 and 39 of the Instructions, which are as follows:

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel everyone who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war — such

⁴ The italics are Mr. Magoon's.

as judges, administrative or police officers, officers of cities or communal governments — are paid from the public revenues of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

In article 26 Dr. Lieber used “expel” in the sense of “remove from office.” That this was understood by the framers of the original project for the Brussels Declaration, which was largely based on the Instructions, and which, as modified by the Brussels Conference, was in turn the basis of the Hague Regulations, is shown by paragraph 4 of that project, which is as follows:

The military authority may require the local officials to undertake on oath, or on their word, to fulfill the duties required of them during the hostile occupation; it may remove those who refuse to satisfy this requirement, and prosecute judicially those who shall not fulfill the duties undertaken by them.

If the authority of these officials ceases by the fact of occupation itself there would be no meaning to the rule that they can be removed if they refuse to take an oath of fidelity to the occupier. So article 39, in providing that those officials who continue the work of their office (functions) shall continue to be paid until the military government wholly or partially discontinues it, negatives the idea that their functions are discontinued by the occupation itself.

It seems clear, then, that the interpretation put on the sixth article is erroneous. To have warranted the interpretation placed on it, it would have had to read that functions should continue only *with the express authorization* of the occupier, instead of “only with the sanction.” The difficulty arose from Dr. Lieber’s dealing with two distinct situations in the second half of his article. If it had stopped with “cease under martial law” the contrast between the two sections of the article would have been appropriate and the article would have stated the well-settled proposition that the laws specified continue in force after occupation, unless interrupted or stopped, but that the functions of the hostile government cease for the period of the occupation through the fact of occupation itself.

But it is the functions of the hostile government, its right to direct officials in the occupied territory, which cease for the period of the

occupation, and not the functions of the local and civil officials acting only in discharge of their legal duty and independently of their government. The remainder of article 6, commencing with "or continue only with the sanction," etc., does not have much meaning unless applied to the functions of the civil officials of occupied territory acting independently of their own government, but it is clear that the contrast between the effect of occupation on the *law* of the occupied territory and on the *functions* of the hostile government applies only to the hostile government itself or its governmental officials in the territory. This distinction between officials identified with the hostile government and strictly local or civil officials will be best brought out in connection with the second contention in the report.

Mr. Magoon's second contention was that the office of high sheriff of Havana became *functus officio* by the fact of occupation. He says:

If the high sheriff of Havana was an officer of the Crown of Spain, similar in character to that of the Spanish governor-general of Cuba or the Spanish governor of the Province of Havana, it would seem unnecessary to produce argument to show that, upon the military occupation of Havana being established, the office and appurtenant rights, privileges, and authority passed away with the sovereignty upon which the office depended and of which it was an instrument, agent, or vassal. If the officers of the previous sovereignty remain in office and continue to exercise the powers derived from the previous sovereignty, wherein has the previous sovereignty been displaced?

Two propositions are assumed here which are entirely inadmissible: that sovereignty is displaced by military occupation, and that, accordingly, military occupation abrogates offices. Under the old theory of conquest it was held that on an invader acquiring firm possession of the hostile territory sovereignty over that territory and its inhabitants passed to him, subject to revestment by reoccupation or the treaty of peace. Such was the well-settled law prior to the French Revolution, and the inhabitants of the occupied territory were liable to take the oath of allegiance to the occupant and to compulsory military service in his armies. The renunciation of wars of conquest by the French people in the Constitution of 1791, however, resulted in a change of the doctrine that the inhabitants of territory

firmly occupied by the French armies became French, and this was embodied in a decision of the Court of Cassation in 1818.⁵ A decision of a similar nature emphasizing the provisional nature of military occupation until the termination of war was made some years afterwards by a German university in the case of the debts and domains of Hesse-Cassel confiscated or alienated by Napoleon the First.⁶ In 1844 this doctrine was incorporated into the work of the great German publicist Heffter. Since then it has become universally accepted by publicists of every nationality, and numerous applications of it are embodied in the Hague Regulations. Dicta embodying the old doctrine of conquest during war are to be found in *United States v. Rice*⁷ and *Fleming v. Page*,⁸ but they are merely survivals of the old doctrine and without authority to-day. The true doctrine was early expressed by Chief Justice Marshall in the case of the *American Insurance Co. v. Canter*,⁹ when he said:

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed.

As Mr. Magoon's second proposition, that the office of high sheriff became *functus officio* through the fact of occupation, was based on the proposition that the occupation displaced Spanish sovereignty, the two propositions must fall together. The exercise of sovereign power by Spain was suspended by the military occupation, but the Spanish sovereignty was not displaced until the exchange of ratifications of the treaty of peace. In fact, the position that any office is abolished by the fact of occupation alone is inadmissible. Offices exist by law, whether the law proceeds from a legislature or the executive, and the effect of military occupation may be to suspend but it does not extinguish them.

But although Spanish sovereignty was not extinguished by the

⁵ T. Ortolan, *Diplomatie de la Mer*, 1, 292.

⁶ III Phillimore, 841.

⁷ 4 Wheaton, 246.

⁸ 9 Howard, 603.

⁹ 1 Peters, 542.

military occupation, it was extinguished by the exchange of ratifications of the treaty of peace, and what the report has to say on the effect of the extinction of sovereignty on offices, while not applicable to military occupation, is applicable to the condition of affairs which arose out of the relinquishment of Spanish sovereignty in the treaty.

It will be remembered that Mr. Magoon's second contention was that if the office of high sheriff of Havana was similar in character to that of the governor-general of Cuba or to that of the governor of Havana, it passed away with Spanish sovereignty. The distinction he had in mind between offices which do not pass away with the extinction of sovereignty and those which do was based on a passage quoted by him from an opinion of the Attorney-General to the Secretary of War dated July 10, 1899. As that opinion is a valuable statement of the law on this point it will be quoted with considerable fullness.

The opinion of the Attorney-General was in reply to six questions by the Secretary of War, the first four of which are as follows:

1. Are the Spanish laws and regulations of municipalities in the dependencies of Spain now in force in Cuba as they existed at the time the island was relinquished by Spain?

2. Are the provisions of said laws and regulations, which required the assent and approval of the officers of the Crown of Spain to the various acts of the municipal authorities, now in force in Cuba?

3. Did the authority and power of said officers of the Crown of Spain, under said laws and regulations, pass to the officers of the United States now in charge of the government of civil affairs in said island, and may such authority now be exercised by said officers of the United States?

4. What direction and control over the action of the municipal authorities of Havana in the matter of engaging in the construction of public works for said city, by contract, may properly be exercised by the officers of the United States now discharging the functions of civil government in Cuba.¹⁰

In answer, the Attorney-General said:

By well-settled public law, upon the cession of territory by one nation to another, either following a conquest or otherwise, those internal laws and regulations which are designated as municipal continue in force and operation for the government and regulation of the affairs of the people of said territory until the new sovereignty imposes different laws or regu-

¹⁰ 22 Opinions of Attorneys-General, 527.

lations. Those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon the transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. Such laws for the government of municipalities in said territory as are not dependent on the will of the former sovereign remain in force. Such laws as require for their complete execution the exercise of the will, grace, or discretion of the former sovereign would probably be held to be ineffective under the succeeding power. So that any inchoate rights or grants made by a municipal body in Cuba while under Spanish sovereignty, which for their completion required the assent or approval of the Crown or of the Crown officers, would, in the absence of such assent or approval made prior to the treaty of cession, be ineffective and incomplete. The authority and power of the Crown and of the Crown officers in such instances did not pass to the officers of the United States, because the royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of a treaty of cession, or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide.

In other words, municipal organizations and the laws with regard to them continue after the change of sovereignty until the new government directs otherwise, while the Crown, Crown offices, and the laws with regard to them pass away with the sovereignty which created them. The latter are what the Attorney-General terms laws pertaining "to the prerogatives of the former government." They are an instance of the more general "political laws" which the Attorney-General also mentioned as abrogated by this extinction of sovereignty, and were specified because of their application to the questions which the Attorney-General was asked. As this distinction of the Attorney-General is well settled, and as it was accepted by Mr. Magoon in his report and by the War Department in its conduct of affairs in Cuba, it is not thought necessary to go into the authorities in support of it. The only question that remains is that asked by Mr. Magoon: "Was the office of high sheriff political in character, and did it pertain to the prerogatives of the Spanish Crown?" The latter part of the question might be put more succinctly in the terminology of the Attorney-General, Was he a Crown officer? Certainly not in his municipal capacity, for it was municipal officers that the Attorney-General was contrasting with Crown officers. Nor would it seem in his capacity as an officer of the courts. What the

Attorney-General meant by a Crown officer was one through whom the "will, grace, or discretion" of the Crown would be exercised or, in other words, one who was a governmental officer, representing the policy of the Crown. This would not apply to one whose only national function seems to have been the service of writs. This brings us to the distinction between political or governmental and civil officers.

The distinction is one familiar to the law of military occupation in time of war. It is there used to indicate those officers whose authority is suspended during the occupation because of the closeness of their identification with the hostile government itself. If military occupation is followed by the cession of the territory, the laws pertaining to their offices, which were suspended during the occupation, are abrogated. It was to this class that the office of governor-general of Cuba and governor of Havana belonged.

Just where the line is to be drawn between political officers and nonpolitical officers is impossible to say, but the clearest examples of nonpolitical officers are those given by Dr. Lieber in article 39 of his Instructions, already quoted, namely, "judges, administrative or police officers, officers of city or communal governments." Rivier¹¹ makes the same classification. He says:

In default of orders or instructions it would appear natural that the political functionaries, organs of the government, should retire, while the purely administrative functionaries and employees would do well not to desert their posts. * * * According to the distinction established above, prefects, subprefects, governors, etc., ought to retire; in any case their continuance in office would be most difficult. Their adhesion to the enemy occupation would strongly resemble treason. It is entirely different with municipal and communal authorities, mayors, etc., agents of police, teachers, etc.

Numerous authorities to the same effect could be cited if desirable. What is noteworthy of all of them is that municipal officers and the officers of the courts are the typical examples of nonpolitical officers. If all the functions of the high sheriff had continued to be exercised, therefore, they would have been of the typical nonpolitical class.

Nor is the position that the office of high sheriff was a nonpolitical

¹¹ II, 304, 305.

office weakened by anything said in the report. Probably all Spanish officers were offices of the Crown at the time the *cédulas* were issued that are cited in the report, in the sense that their creation and provision was a royal prerogative, but this does not bring them within the meaning of the rule laid down by the Attorney-General. It is true, also, that the police power is one of the highest and most despotic powers of sovereignty, and that our courts have held that it can not be alienated, but health officers are not what are called political officers. It is a familiar fact that a very large part of the police power is exercised by municipal officers and these are of all officers the ones that are nonpolitical in the sense of the law in question. The continuance of these nonpolitical officers in authority did not involve a continuance of the sovereignty of Spain. It need have meant nothing more than that the law of nations, which is a part of the law of all civilized nations, decrees that the nonpolitical laws and the nonpolitical officers under the old sovereignty shall be the laws and officers under the new sovereignty until the new sovereignty shall decree otherwise. It seems clear, therefore, that, according to the rule of the law of nations laid down by the Attorney-General, the relinquishment of Spanish sovereignty did not abrogate the office of high sheriff of Havana. Much of the same reasoning would apply to the Sanches case. The plaintiff there was an officer of the courts and therefore not a political officer.

The invalidity of the contention in the report that the office of high sheriff was abrogated by the military occupation is fatal to the proposition depending on it that the complainant should have sought relief under Article VII of the treaty of peace for injuries prior to the exchange of ratifications instead of Article VIII, which declares that the relinquishment of Spanish sovereignty should not impair private property rights, and to the proposition also depending on it that if the office were property it was property situated in the track of war and destroyed by war for which the owner was entitled to no compensation.

If, then, the slaughterhouse privilege of the Countess O'Reilly was not abrogated by the American occupation or by the extinction of the sovereignty of Spain in Cuba, was it abrogated by the order of

General Ludlow of May 20, 1899? If the reader will refer to that order he will notice that the privilege is not referred to as appurtenant to any office. The reason for this will be shown by the following quotation from the report of the Havana finance commission to General Ludlow, on the recommendation of which he had made the order:

In the larger slaughterhouse, where only cattle are killed, the commission found that the descendants of the Count O'Reilly y de Buena Vista held a monopoly on the right of carrying the dressed beef to the butcher shops, for which they were allowed to charge 50 cents a carcass. This monopoly originated in 1706 as a Crown grant to the high constable (*alguacil mayor*) of the city of Havana, as a partial payment for the services which he rendered in that office, and as a sanitary measure. This office has long ceased to exist.¹²

It is evident that the order was based on the supposition that the "concession," if ever attached to the office, had become independent of it. That the recommendation of the committee was not based on considerations of public health is shown by their statement that "the commission investigated the management of the slaughterhouses and found it businesslike and efficient" and by the fact that the city continued to employ the subcontractor to whom the concession had previously been leased. The measure was one of finance and not of police power, and the commission reported that the revenue of the city had been increased about \$10,000 a year by this change alone.

If, as was assumed in the order, the slaughterhouse privilege had been independent of the office, the legality of the order would have been open to serious question independently of the authority of the particular officer issuing the order. At best it would have amounted to the taking of a private franchise under the power of eminent domain with the unsatisfactory provision for compensation that the owners should get what relief they might in the courts. The privilege would have been somewhat similar to the private monopoly held to be property by the United States Supreme Court in the Slaughter House cases, subject to revocation without compensation under the police power but not to be arbitrarily taken from one person and granted to another. The objections to the validity of the order were

¹² Report of the War Department, Vol. I, part 3, p. 287.

sufficient to cause General Brooke, instead of confirming it, to issue a new order "in harmony" with it.

It is hard to see, however, how the privilege could have become disassociated from the office. There is no evidence that the office of high sheriff had ever been formally abolished. He had ceased to be a member of the city council by the law of 1878. Possibly also the law of civil procedure had made other provision for the service of writs; while if the duties in connection with the slaughterhouse be considered as incident to the emoluments rather than as duties of the office, he had even ceased to perform any of the duties of the office. But the right to the emoluments of the office expressly remained, and while that right remained and the office was not formally abolished it is hard to say that in a legal sense the office was extinct. Counsel for the Countess O'Reilly based their contention that the privilege had become disassociated from the office on the theory that the laws of 1859 and 1878 had abolished the office and substituted a contract between the city and the holder of the old office and his successors, whereby the latter were to continue in their slaughterhouse privileges pending indemnity. If the office was not abolished the contract theory falls with it.

The possibility of placing the abolition of the slaughtering monopoly on stronger ground than General Ludlow's order evidently became apparent to the authorities in Cuba and General Brooke's order squarely abolished the office of high sheriff itself. The language of the order would bring it under the police power, but Judge Holt, after an examination of the facts on the trial, held that it had not been issued under the police power, and as that holding has not been questioned it will be taken that the order was an exercise of the power which the United States had to reorganize government in Cuba. It will also be taken that the order was ratified by the governmental authorities of the United States and that therefore it was the act of the United States as intervening Government. In examining the order, it will be necessary to consider whether there was a right of private property to the emoluments of the office, whether General Brooke's order abolishing the office was valid, and whether any liability for indemnification resulted therefrom.

That the office or at least the emoluments of the office were private property under the Spanish law is hardly open to question. None of the provisions of the Spanish law given in Mr. Magoon's report contradict this. The royal *cédula* of October 15, 1787, quoted in the report, which declared that the incumbents of these offices were not "authorized to dispose of the same at will as any estate of their patrimony," recognized that they constituted estates, although not as freely alienable as other estates. They could be revoked at the will of the Crown subject to indemnification, and only a half interest was subject to sale on execution. If any other authority than the provisions quoted in the report are necessary, the following extract from article 336 of the civil code of Spain which was made applicable to Cuba in 1889 is conclusive:

As personal property are also considered: rents or pensions, either for life or hereditary, in favor of a person or family, * * * also purchased public offices, contracts for public services, etc.

Much other authority could be given in support of this, but it is not necessary.

That the laws with regard to the office of high sheriff, and particularly the municipal aspects of the office, remained in force after the relinquishment of Spanish sovereignty has already been shown. The same is true of the laws of property. The grant held by the Countess O'Reilly, therefore, had, even after the ratification of the treaty of peace, a double aspect: on the one hand it was a grant of public office; on the other, a grant of private property.

As to the power of the United States Government in Cuba, no better exposition of it can be given than that of the Attorney-General. In the passage already quoted he says:

The royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of a treaty of cession, or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide.

He then goes on:

Cuba, however, is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal government. In the exercise of these powers the

proper authorities of the United States may change or modify either the forms or the constituents of the municipal establishment; may, in place of the system and regulations that formerly prevailed, substitute new and different ones.

The United States had the right to reconstruct the government of Cuba. This did not result from any transfer of the political powers or royal prerogatives of the Spanish Government to the United States, but from the authority arising from the fact that the United States Government was the *de facto* government of the island. No methods of procedure in the abolition of offices which had been binding on the Spanish authorities were therefore binding on the authorities of the United States, but in exercising this undoubted authority she was bound to recognize any rights under the treaty of peace or the law of nations that were compatible with it. She was free to abolish public offices, but if those offices were also recognized as private property under the prevailing law she was bound to indemnify the holders thereof, both by the law of nations, which protects private property on cession, and the treaty of peace, which was an expression of the international rule. General Brooke's order, therefore, was valid, but the international obligations of the United States could have been satisfied only by disassociating the slaughterhouse privilege from the office and conferring it on the holders of the old office or by the payment of its value. It is submitted that the opinion of Judge Holt, that the Countess O'Reilly had "a just claim for damages for the destruction of her property, against the United States, under its obligations assumed in its treaty with Spain, or against Cuba, under its obligations assumed in its treaty with the United States, or against both Governments,"¹³ is unassailable. Likewise it would seem that the claim of Guillermo Alvarez y Sanches was just.

PERCY BORDWELL.

¹³ 142 Fed. Rep., 863.

HISTORY OF THE STATE DEPARTMENT

III

THE NEW DEPARTMENT

During the interval between the inauguration of the President and the formation of the Executive Departments, the old Departments performed such executive duties as were indispensable. On July 11, 1789, for example, "by the hands of Mr. Jay," Washington sent to the Senate for ratification a consular convention with France. On July 22 the Senate —

Resolved, that the Secretary of Foreign Affairs under the former Congress be requested to peruse the said convention and to give his opinion how far he conceives the faith of the United States to be engaged, either by former agreed stipulations or negotiations entered into by our minister at the court of Versailles, to ratify in its present sense or form the convention now referred to the Senate.

Jay reported July 25, as "The Secretary of the United States for the Department of Foreign Affairs, under the former Congress."¹

Even as late as October 3, 1789, Diego de Gardoqui, charged with negotiations for Spain, wrote to Jay: "Observing that you continue to exercise occasionally the office of Secretary of State," he announced that he would leave Don Joseph de Viar in charge of negotiations while he should be absent.

Jay replied October 7, 1789, that he would receive Mr. de Viar —

Circumstances having rendered it necessary that I should continue, though not officially, to superintend the Department of Foreign Affairs until relieved by a successor.²

On May 7, 1789, Jay submitted the estimates for the "Office of Foreign Affairs" to the "Commissioners of the Treasury." The "establishment of the office" was as follows:

¹ American State Papers, Foreign Affairs, 1, 89.

² Dept. of State MSS., American Letters, Vol. IV.

John Jay, Secretary of the United States for the Department of foreign Affairs	3500
Henry Remsen Junr Under Secretary in the office for foreign affairs.....	800
George Taylor Junr.....	} Clerks at 450 dolrs each..... 900
Jacob Blackwell.....	
John Pintard, Interpreter of the french language.....	250
Abraham Okie, Doorkeeper and Messenger.....	150

Contingent Expences of the Office.

These expences are somewhat uncertain. The amount of them from 24th May 1788 to 7th May 1789, including the allowance to the Interpreters of the Spanish, German and Dutch languages who receive at the rate of 2s per hundred words for translating is about.....		150
Office rent		200

Dollars 5950

Foreign Ministers, &c, &c.

The Hon ^{bl} Thomas Jefferson, Esqr Minister Plenipotentiary at the Court of France	9000
William Short Esqr private Secretary to Mr. Jefferson 300 Louis d'ors a year	
The Honble William Carmichael Esqr Chargé des Affaires at the Court of Madrid	
Qu. is Mr Carmichael's salary to be regulated by the Act of Congress of 4th October 1779, or by that of 11th May 1784?	
Thomas Barclay Esqr Consul General for France now in America.....	1000
Charles W. F. Dumas at the Hague,.....	1300

Contingent Expences.

Postage and Couriers have been uniformly charged and some other articles, and in a certain instance House Rent has also been charged, but not yet decided upon. The accounts are at the Treasury, and their amount in ordinary will furnish a Rule for estimating these contingent expences.³

Until there was a Secretary of State letters to the President on such subjects as belonged to the State Department were sent by the President's secretary to Roger Alden:

UNITED STATES *January 12, 1790.*

SIR,

I am directed by the President of the United States to transmit herewith to you, to be lodged in the office of State with other public papers under your care, and to be delivered to the Secretary of State whenever he may enter upon the duties of his office, the Form of the adoption and

³ Dept. of State MSS., American Letters, Vol. IV.

ratification of the constitution of the United States by the State of North Carolina, which has been officially communicated to him by the President of the Convention of said State; and likewise a letter which accompanied the above form of Ratification from Samuel Johnston President of the Convention of the State of North Carolina to the President of the United States.

ROGER ALDEN, Esquire.⁴

TOBIAS LEAR,
S. P. U. S.

When the Senate called on Jay for an opinion with reference to the consular convention with France, it was merely following the habit of the old Congress, which on such an occasion would have called upon the Secretary of Foreign Affairs. It should properly have addressed the President, who, in accordance with the new order of things, was completely responsible for the conduct of the foreign relations of the United States. The Senate itself recognized early that it had no direct participation in these affairs, as the following letters show:

UNITED STATES *December 8, 1790.*

The SECRETARY OF STATE.

SIR,

In obedience to the command of the President of the United States, I have the honor to transmit herewith sundry communications of the proceedings of Government in the Western Territory from January to July 1790, made by the Secretary of the said territory to the President of the United States, upon which the President requests your opinion as to what should be done respecting them.

I have likewise the honor to transmit, by the President's order, a letter and packet from the President of the national Assembly of France directed to the President and members of the American Congress; this direction prevented the President from opening them when they came to his hands — and he yesterday caused them to be delivered to the Vice-President that they might be opened by the Senate — The Vice-President returned them unopened with an opinion of the Senate that they might be opened with more propriety by the President of the United States, and a request that he would do it, and communicate to Congress such parts of them as in his opinion might be proper to be laid before the Legislature.

The President therefore requests that you would become acquainted with their contents and inform what (if any) should be laid before Congress. Another letter from the National Assembly addressed particularly to the President is inclosed herewith for your perusal. The President has the translation of this letter.

TOBIAS LEAR,
S. P. U. S.

⁴ Washington Papers, Record Book, Vol. 20.

Jefferson replied:

DEPARTMENT OF STATE,
December 9, 1790.

THE PRESIDENT OF THE UNITED STATES,

SIR,

I have now the honor to return you the letter from the President of the Assembly of Representatives of the Community of Paris to the President and Members of Congress, which you had received from the President of the Senate with the opinion of that house, that it should be opened by you, and their request that you would communicate to Congress such parts of it as in your opinion might be proper to be laid before the legislature.

The subject of it is the death of the late Dr. Franklin — it conveys expressions from that respectable city to the Legislature of the United States of the part they take in that loss, and information that they had ordered a solemn and public oration for the transmission of his virtues and talents to posterity, copies of which, for the members of Congress, accompany this letter: and it is on the whole an evidence of their marked respect and friendship towards these United States.

I am of opinion their letter should be communicated to Congress, who will take such notice of this friendly advance, as their wisdom shall conceive to be proper.

TH. JEFFERSON.⁵

Under the new Government the Secretary of the Treasury was made directly accountable to Congress in certain financial matters; beyond this the heads of Departments were wholly subordinate to the President, and had no powers independent of him. The act creating the Department of Foreign Affairs said the Secretary must perform "such duties as shall, from time to time, be enjoined or intrusted to him by the President of the United States, agreeable to the Constitution." The act creating the Department of State said he was to receive from the President bills, orders, and resolutions of Congress; must keep the seal of the United States and affix it to the commissions of civil officers appointed by the President, but must not affix it to any commission until it had been signed by the President, "nor to any other instrument without the special warrant of the President therefor." The President must even approve the device of the seal to be made for the Department.

⁵ Washington Papers, Record Book, Vol. 20. See also Writings of Jefferson (Ford), V, 258.

As the bill providing for the Department of Foreign Affairs passed the House, the Secretary could not even appoint his Chief Clerk, except with the approval of the President; but the Senate modified this provision and left this appointment wholly with the Secretary. The Chief Clerk was to have temporary charge of the Department, if a vacancy occurred in the Secretaryship; but this provision was improved in 1792 by authorizing the President to name the temporary head of the Department.

That in case of the death, absence from the seat of government, or sickness, of the Secretary of State, Secretary of the treasury, or of the secretary of the war department, or of any officer of either of said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence, or inability by sickness shall cease. (Approved May 8, 1792.)

This was, in its turn, modified in 1795.

That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the department of War, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices, until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months. (Approved, February 13, 1795.)

The President deposited in the several departments all official letters which came to him. Jefferson, after he became President, described the system in a letter to the Secretary of State:

WASHINGTON Dec. 29. 1801.

SIR

Having no confidence that the office of the private secretary of the President of the US. will ever be a regular & safe deposit for public papers or that due attention will ever be paid on their transmission from one Secretary or President to another, I have, since I have been in office, sent every paper, which I deem merely public, & coming to my hands, to be deposited in one of the offices of the heads of departments; so that I shall never add a single paper to those now constituting the records of the

President's office; nor, should any accident happen to me, will there be any papers in my possession which ought to go into any public office. I make the selection regularly as I go along, retaining in my own possession only my private papers, or such as, relating to public subjects, were meant still to be personally confidential for myself. Mr. Meredith the late treasurer, in obedience to the law which directs the Treasurer's accounts to be transmitted to & remain with the President, having transmitted his accounts, I send them to you to be deposited for safe keeping in the Domestic branch of the office of the Secretary of State, which I suppose to be the proper one. Accept assurances of my affectionate esteem & high respect.

TH: JEFFERSON

The SECRETARY OF STATE.⁶

Washington made the Department of State the repository of letters to him which often related to business under other Departments, and referred to it all the applications for office he received.⁷ The following is an example of the communications sent from the President's office:

The SECRETARY OF STATE.

UNITED STATES 20 Jan: 1792

By the President's command Tob^s Lear has the honor to transmit to the Secretary of State the enclosed Letter from Governor Lee, with a Report of a Committee of the General Assembly of Virginia, and a Resolution of that Body respecting certain bounty Lands granted by that State to the Officers & Soldiers of the Virginia Line.

The President requests the Secretary of State to take this matter into consideration and report to him thereon.

TOBIAS LEAR,
S. P. U. S.⁸

As soon as he had organized his administration Washington made an executive council from the heads of the three Departments and the Attorney-General, who had no Department; and when he desired a question submitted to them and could not himself be present at their meeting he directed that they meet at the office of the Secretary of State. Lear wrote to Jefferson in 1793:

⁶ Dept. of State MSS., Misc. Letters.

⁷ See the Department's publication (1901), *Calendar of Applications and Recommendations for Office during the Presidency of George Washington*.

⁸ *Washington Papers, Record Book, Vol. 21.*

By the President's command T. Lear has the honor to return to the Secretary of State the draught & copies of letters which he sent to the President this day, — and to inform the Secretary, that the President is so much indisposed that he does not believe he shall be able to meet the Gentlemen at his House tomorrow (the President having had a high fever upon him for 2 or 3 days past, & it still continuing unabated). he therefore requests the attendance of the Heads of the other Departments & the Attorney General at his office tomorrow — and lay before them for their consideration & opinion such matters as he would have wished to have brought to their view if they had met at the President's — & let the President know the result of their deliberations.

The President likewise directs T. Lear to send to the Secretary of State the opinions of the Gentlemen, expressed at their last meeting on the subject of Indian affairs in Georgia, for their signature to-morrow; & to have the blank which is left therein to limit the time of the service of the troops filled up. —

Also a note from the Attorney General relative to certain communications from Baltimore — which the President thinks would be best to lay before the Gentlemen.

TOBIAS LEAR
S. P. U. S.

31st May, 1793 *

When Washington left for his Southern tour in 1791 he notified the members of his Cabinet of his itinerary, in order that they might be able to reach him with official communications. They met during his absence and considered public business. The Vice-President presided and the Secretary of State sent reports of the meetings and of such conclusions as had been reached.

Under date of April 17, 1791, Jefferson wrote to the President:

I had the honor of addressing you on the 2nd which I supposed would find you at Richmond, and again on the 10th which I thought would overtake you at Wilmington, the present will probably find you at Charleston.

According to what I mentioned in my letter of the 10th the Vice President, Secretaries of the Treasury and War and myself met on the 11th. Colonel Hamilton presented a letter from Mr. Short in which he mentioned that the month of Feb^r being one of the periodical months in Amsterdam when from the receipt of interest and refunding of capitals there is much money coming in there, and free to be disposed of, he had put off the opening of his loan till then, that it might fill the more rapidly, a circumstance which would excite the presumption of our credit

* Washington Papers. Record Book, Vol. 21.

— that he had every reason to hope it would be filled before it would be possible for him, after his then communication of the conditions, to receive your approbation of them and orders to open a second; which however he awaited, according to his instructions, but he pressed the expediting the order, that the stoppage of the current in our favor might be as short as possible. We saw that if under present circumstances, your orders should be awaited, it would add a month to the delay, and we were satisfied, were you present, you would approve the conditions and order a second loan to be opened — we unanimously therefore advised an immediate order on the condition the terms of the second loan should not be worse than those of the first. — General Knox expressed an apprehension that the 6 nations might be induced to join our enemies

* * * ¹⁰

He wrote on May 1, 1791:

* * * I write to day indeed merely as the Watchman cries, to prove himself awake, and that all is well, for the last week has scarcely furnished anything foreign or domestic worthy of your notice * * * ¹¹

The Secretary of State was the agency for transmitting all commissions to officers appointed by the President other than military officers, who were under the jurisdiction of the War Department, the form being as follows:

To RUFUS PUTNAM, Esquire.

NEW YORK *April 7th 1790.*

SIR

The President of the United States desiring to avail the public of your services as one of the Judges in and over the Territory of the United States North West of the Ohio, I now have the honor of enclosing you the commission, and of expressing to you the sentiments of perfect esteem with which I am, &c ¹²

Jefferson consulted his Chief constantly. The following is an example of the notes sent:

Mr. Jefferson has the honour of enclosing for the perusal of the President, rough draughts of the letters he supposes it proper to send to the court of France on the present occasion. He will have that of waiting on him in person immediately to make any changes in them the President

¹⁰ Washington Papers. Record Book, Vol. 20. The full letter may be seen in The Writings of Jefferson (Ford), V, 320.

¹¹ *Ibid.*

¹² Dept of State MSS., American Letters, Vol. IV.

will be so good as to direct, and to communicate to him two letters just received from Mr Short.

April 5. 1790. a quarter before one.¹³

Little of the business of the Department, even of a routine character, was transacted without the President's sanction.

In a letter dated June 12, 1815, to the Secretary of the Navy, President Madison stated what were the relations of the head of a Department to the President.

By the structure of the several Executive Departments, and by the practice under them, the Secretary of the Navy, like the other Secretaries, is the regular organ of the President for the business belonging to his Department; and with the exception of cases in which independent powers are specially vested in him by law, his official acts derive their authority from, or, in other words, carry with them, the authority of the Executive of the United States. Should a head of a Department at any time violate the intentions of the Executive, it is a question between him and the Executive. In all cases where the contrary does not appear, he is understood to speak and to act with the Executive sanction, or, in other words, the Executive is presumed to speak and to act through him.¹⁴

The Secretary of State, as the custodian of the seal of the United States and the agency for the promulgation of the laws, occupied a position of higher dignity than attached to the head of any other Department, and a closer relationship to the Chief Executive. His domestic functions were intended to be extensive. "At least," wrote Washington to Jefferson, "it was the opinion of Congress, that, after the division of all the business of a domestic nature between the Departments of the treasury, war, and state, those which would be comprehended in the latter might be performed by the same person, who should have the charge of conducting the department of foreign affairs."¹⁵ Jefferson described the Department as embracing "the whole domestic administration (war and finance excepted)."¹⁶

In many cases the President was obliged to decide to what Department certain duties belonged. Post-office affairs, for example, Jefferson had supposed would fall under his general supervision. He wrote to Timothy Pickering, the Postmaster-General:

¹³ Washington Papers, Record Book, Vol. 21.

¹⁴ Madison MSS., Library of Congress.

¹⁵ Writings (W. C. Ford), V, 139.

¹⁶ Writings (P. L. Ford), II, 468.

PHILADELPHIA *March 28. 1792. Wednesday morning.*

SIR

The President has desired me to confer with you on the proposition I made the other day, of endeavoring to move the posts at the rate of 100 miles a day. It is believed to be practicable here, because it is practized in every other country: the difference of expense, alone, appeared to produce doubts with you on the subject. If you have no engagement for dinner to day, and will do me the favor to come and dine with me, we will be entirely alone, and it will give us time to go over the matter and weigh it thoroughly. I will in that case ask the favor of you to furnish yourself with such notes as may ascertain the present expense of the posts, for one day in the week to Boston, and Richmond, and enable us to calculate the savings which may be made by availing ourselves of the Stages. Be pleased to observe that the stages travel all the day: there seems nothing necessary for us then but to hand the mail along through the night till it may fall in with another stage the next day, if motives of economy should oblige us to be thus attentive to small savings. If a little latitude of expense can be allowed, I should be for only using the Stages the first day, and then have our own riders. I am anxious that the thing should be begun by way of experiment for a short distance, because I believe it will so increase the income of the post office, as to show we may go through with it. I shall hope to see you at three o'clock. I am with great esteem Sir &c.¹⁷

Washington, however, thought that the post-office properly belonged under the supervision of the Treasury Department. The mint, on the other hand, he placed under the State Department. He wrote to Jefferson October 20, 1792:

The post office (as a branch of Revenue) was annexed to the Treasury in the time of Mr. [Samuel] Osgood [Postmaster-General]; & when Col^o Pickering was appointed thereto, he was informed, as appears by my letter to him dated the 29 day of August 1791, that he was to consider it in that light. If from relationship, or usage in similar cases (for I have made no inquiry into the matter, having been closely employed since you mentioned the thing to me in reading papers from the War Office) the mint does not appertain to the Department of the Treasury, I am more inclined to add it to that of state, than to multiply the duties of the other.¹⁸

Accordingly, the Secretary of State managed the affairs of the mint. December 18, 1792, he wrote:

¹⁷ Dept. of State MSS., American Letters, Vol. IV.

¹⁸ Washington Papers, Record Book, Vol. 21.

The PRESIDENT OF THE UNITED STATES.

Th. Jefferson has the honor to send the President 2 cents made on Voight's plan, by putting a silver plug worth $\frac{3}{4}$ of a cent, into a copper worth $\frac{1}{4}$ of a cent. Mr. Rittenhouse is about to make a few by mixing the same plug by fusion with the same quantity of Copper. he will then make of copper alone of the same size, and lastly he will make the real cent as ordered by Congress, four times as big. Specimens of these several ways of making the cent will be delivered to the Committee of Congress now having the subject before them.¹⁹

When Jefferson entered upon his duties he found two officers of equal rank in charge of the Department's affairs. Henry Remson, Jr., had been elected Under Secretary of Foreign Affairs March 2, 1784, and was given charge of the papers of the Department of Foreign Affairs when the new Government was formed. Roger Alden was elected Deputy Secretary of Congress under Charles Thomson in 1785, and was directed by Washington, when he became President, to take custody of the great seal and other papers of Congress not connected with foreign affairs, finance, or war. Although the law provided for one Chief Clerk, Jefferson determined to leave Remson and Alden in equal rank in the new Department.

When I arrived here [he wrote to Benjamin Smith Barton August 12, 1790], I found Mr. Alden at the head of the home office and Mr. Remson at that of the foreign office. Neither could descend to a secondary appointment, & yet they were each so well acquainted with their respective departments & the papers in them, that it was extremely desirable to keep both. On this ground, of their peculiar familiarity with the papers & proceedings of their respective offices, which made them necessary to me as indexes, I asked permission to appoint two chief clerks. * * * One of them [Alden] chusing afterwards to engage in another line I could do nothing less, in return to the complaisance of the legislature, than declare that as the ground on which alone they were induced to allow the second office, was now removed, I considered the office as at an end, and that the arrangement should return to the order desired by the legislature.²⁰

The act of June 4, 1790, gave the authority to employ two principal clerks each at a salary of \$800 per annum. On July 25, 1790, Alden resigned to enter private life, being dissatisfied with the com-

¹⁹ Washington Papers, Record Book, Vol. 21.

²⁰ Writings (Ford), V. 223.

pensation of his office,²¹ and Remsen then became the Chief Clerk, occupying that position until 1792, when he resigned to become the first teller of the new United States Bank, and his place was taken by George Taylor, of New York, who was promoted from a clerkship in the Department.

The form of appointment was:

Department of State to wit.

George Taylor, heretofore a clerk in the office of the Secretary of State, is hereby appointed a chief clerk thereof in the room of Henry Remsen resigned. Given under my hand this first day of April, 1792.

TH: JEFFERSON.²²

June 17, 1790, Jefferson sent the Secretary of the Treasury an estimate of the probable expenses of the Department for one year from April 1 last:

	dollars
The Secretary of State, his salary	3500
1st The Home Office	
One Clerk a 800 doll ^{rs} and one do a 500 doll ^{rs}	1300
Office Keeper and Messenger	200
Stationary	110
Firewood	50
Newspapers from the different States, suppose 15 a 4 dollars	60
A collection of the Laws of the States to be begun, suppose	200
Drenan's account of 1780, August 19 th going express	6 doll ^{rs}
Maxwell's Do.	10
	<hr/>
	1836
2d The Foreign Office	
One Clerk a 800 doll ^{rs} two Do a 500 doll ^{rs} each	1800
The french interpreter	250
Office-Keeper and Messenger	200

²¹ In 1822 Alden applied for an office from President Monroe, his personal friend. He stated that he had served in the Revolution in 1777 as aide to General Benedict Arnold; was afterwards a major in the brigade of General Huntington; served under Washington, and in 1780 was selected by him as an aide, but recommended Colonel Humphreys in his place. His last military service was as aide to General Parsons, and he resigned in February, 1781. Afterwards he studied law under Samuel Johnson of Connecticut; was appointed Deputy Secretary of Congress in 1785 and continued in that office until he became a principal clerk in the Department of State. (D. of S. MSS., Applic. for Office.)

²² Dept. of State MSS., American Letters, Vol. IV.

Rent of the Office.....	200
Stationary &c.....	75
Firewood	50
Gazettes from abroad, and do to be sent abroad.....	25
Contingencies	25

NEW YORK, *June 16th 1790*

2625

28 7961

December 11, 1790, he made the estimates for the ensuing year as \$8008.50, having combined the home office and foreign affairs. He had one chief clerk at \$800 per annum; three clerks at \$500 each; "clerk for foreign languages," \$250; "office rent at Philadelphia \$187.50, Ditto at New York, supposing the house there not to be let, or if let, the Rent not recovered for the office is responsible, 150." ²⁴

One of the clerks, the French translator, it will be observed, received only \$250 per annum, but it was not intended that he should devote his whole time to his official duties, as his colleagues did. Other translators were employed for other languages. Isaac Pinto, who was appointed interpreter of the Spanish language November 24, 1786, continued to serve for several years and complained in a letter dated November 13, 1789, that in three years his entire compensation had amounted to only £8.12.4. ²⁵

To the post of French translator Philip Freneau, "the poet of the Revolution," was appointed August 16, 1791, and while he held it he edited the National Gazette, a newspaper started at the instigation of Jefferson and his friends and the organ of their party.

The clerks were paid out of a general fund, no specific appropriation being made until the act of December 23, 1791, named as the whole amount for the ensuing year for the Secretary and officers \$6,300.

The appropriation was meant to include the whole force of the Department, except messengers or laborers, although it spoke of the Secretary "and officers" and did not specify clerks. An act passed

²³ Dept. of State MSS., American Letters, Vol. IV.

²⁴ Dept. of State MSS., American Letters, Vol. IV.

²⁵ Dept. of State MSS., American Letters, Vol. IV.

the same year required an oath of office from every clerk and "other officer" in the Departments. Clerks were thus officers. In 1868 Attorney-General Evarts, having the question presented to him by the Secretary of the Treasury, gave an opinion, following that of the Supreme Court,²⁶ that "clerks in the several executive departments were officers under the government of the United States."²⁷ In 1896, in response to a request for an opinion by the Secretary of State, the Attorney-General expressed the opinion that all of the officers of the State Department who were below the rank of the Assistant Secretaries were clerks in the meaning of the law.²⁸ Legally speaking, therefore, not only are clerks officers, but officers are clerks.

The act creating the Department of Foreign Affairs required that the Secretary and each of his subordinates should, before entering upon his duties, take an oath "*well and faithfully to execute the trust committed to him.*" This was modified subsequently by the act of March 3, 1791, to require every clerk and "other officer" who had been appointed in any of the Departments and who had not already done so, as well as all who should subsequently be appointed, to take an oath or affirmation before a Justice of the Supreme Court, or a judge of a United States district court, to support the Constitution of the United States as well as to faithfully perform the duties intrusted to him. No regular form of oath was prescribed, but the wording usually ran: "I, A. B., do solemnly swear (or affirm) that I will support the Constitution of the United States and well and faithfully execute the trust confided to me as _____." Later a new form came into use, the first one of which is found in 1807:

I John Graham clerk in the Department of State do solemnly swear that I will well and faithfully execute the trust reposed in me according to the best of my skill and Judgement, and particularly that I will make no copies of, or extracts from, any Books or Papers belonging to the said office; but such as I shall be directed or authorized by the Secretary to make nor will I disclose the secrets of the office — I do further swear that I will support the Constitution of the United States and serve them in the

²⁶ 6 Wall., 393.

²⁷ 12 Op., 521.

²⁸ 15 Op., 3.

office which I now hold, under their authority with fidelity and honor, according to the best of my skill and understanding.

JOHN GRAHAM

Sworn this 25th July 1807

before

William Thomson ²⁹

This form of oath was probably put into effect because there had been in 1800 disclosures of official secrets by two clerks in the office of the Auditor of the Treasury Department,³⁰ but it does not seem to have remained in use for a long time, the simpler form of an oath of allegiance and to perform faithfully the duties of office being returned to.

The organic act of the Department of State required that the Secretary should provide a Department seal, the President approving the design. The War Department found ready for its use the old seal of the Board of War and Ordnance and the Treasury Department the seal of the Board of Treasury, but the Department of Foreign Affairs had had no seal, so there was no guide for the new Department to follow.

Jefferson had served in 1776 on the first committee chosen by Congress to prepare the design for the arms of the United States; but the device submitted was rejected. He was not, therefore, wholly inexperienced on the subject of official seals; but he does not appear to have made any attempt to make an original one for his Department, and simply chose the arms of the United States. In the inner surrounding circle is the legend: "Department of State United States of America." No record of the precise time of the adoption of the seal is found, but the device has remained without any further change than has arisen from several new seals being cut.

The Department was the medium through which correspondence with the National Government and the several State governments was conducted. How the communications from the States to Congress were to be transmitted was the subject of the following letter from Jefferson to Washington (April 1, 1790):

²⁹ Dept. of State MSS., Bureau of Appointments.

³⁰ They were Anthony Campbell and William P. Gardner. See *American Historical Review*, Vol. III, p. 282.

Th. Jefferson has the honor to inform the President that Mr Madison has just delivered to him the result of his reflections on the question *How shall communications from the several states to Congress through the channel of the President be made?*

He thinks that in no case would it be proper to go by way of *letter from the Secretary of state*: that they should be delivered to the houses either by the Secretary of state in person or by Mr Leir, he supposes a useful division of the office might be made between these two, by employing the one where a matter of fact alone is to be communicated, or a paper delivered in the ordinary course of things and where nothing is required by the President; and using the agency of the other where the President chuses to recommend any measure to the legislature and to attract their attention to it.

The President will be pleased to order in this what he thinks best. T. Jefferson supposes that whatever may be done for the present, the final arrangement of business should be considered as open to alteration hereafter. The government is as yet so young, that cases enough have not occurred to enable a division of them into classes, and the distribution of these classes to the persons whose agency would be the properest.

He sends some letters for the President's perusal, praying him to alter freely anything in them which he thinks may need it.³¹

Under the Confederation the President of Congress always transmitted acts of Congress to the executives of the States, but the Secretary of Foreign Affairs was commonly the medium of correspondence with the governors.³² The Department of Foreign Affairs took the duty of sending the acts and of other correspondence under the new Government.

Jay wrote to the governors of New York and Massachusetts September 4, 1789:

In pursuance of the Orders of the President of the United States, I have the honor of transmitting to your Excellency herewith enclosed, a copy of an Act of Congress of the 6th June 1788 and of a concurrent Resolution of the Senate and House of Representatives (passed by the latter on the 10th and concurred in by the former on the 19th August last). In pursuance of a request contained in this Resolution, the President has been pleased to appoint Andrew Ellicott to compleat the survey therein mentioned; who will begin that work on the tenth day of October next; and am directed to give your Excellency this information in order that the State of ——— may if they think proper, have persons attending at the time.³³

³¹ Washington Papers, Record Book, Vol. 21; also Jefferson's Writings (Ford), V, 150.

³² Writings of Madison (Hunt), I, 291.

³³ Dept. of State MSS., American Letters, Vol. IV.

The joint resolution directed the Geographer of the United States to ascertain the boundary line between the United States and the States of New York and Massachusetts, agreeably to the deeds of cessions of those States.

Jefferson continued the practice of Jay.

(Circular)

To the Governors of the several States.

NEW YORK, March 31st 1790.

SIR

I have the honor to send you herein enclosed two copies, duly authenticated, of the act providing for the enumeration of the inhabitants of the United States; also of the act to establish an uniform rule of naturalization; also of the act making appropriations for the support of Government for the year 1790; and of being with sentiments of the most perfect respect &c.

THOMAS JEFFERSON.²⁴

It was Jefferson's opinion, however, that some of the correspondence with the governors of the States might be carried on directly with the President. He wrote to the President November 6, 1791:

I have the honour to inclose you a draught of a letter to Governor Pinckney, and to observe that I suppose it to be proper that there should, on fit occasions, be a direct correspondence between the President of the U. S. and the governors of the states; and that it will probably be grateful to them to receive from the President answers to the letters they address to him. The correspondence with them on ordinary business may still be kept up by the Secretary of State in his own name.²⁵

There was no doubt, however, that the Secretary of State was to be the sole intermediary of correspondence with our agents abroad and the agents of foreign governments to the United States. The rule was laid down before Jefferson's appointment, when Washington declined direct correspondence with Moustier, the French minister.

American representatives continued to serve abroad without in all cases receiving new commissions. Jefferson wrote to Washington February 4, 1792:

²⁴ Dept. of State MSS., American Letters, Vol. IV.

²⁵ Washington Papers, Record Book, Vol. 20.

The laws and appointments of the antient Congress were as valid and permanent in their nature, as the laws of the new Congress, or appointments of the new Executive; these laws & appointments in both cases deriving equally their source from the will of the Nation: and when a question arises, whether any particular law or appointment is still in force, we are to examine, not whether it was pronounced by the antient or present organ, but whether it has been at any time revoked by the authority of the Nation expressed by the organ competent at the time. The Nation by the act of their federal convention, established some new principles & some new organizations of the government. This was a valid declaration of their will, and *ipso facto* revoked some laws before passed, and discontinued some offices and officers before appointed. Whenever by this instrument, an old office was superseded by a new one, a new appointment became necessary; but where the new Constitution did not demolish an office, either expressly or virtually, nor the President remove the officer, both the office and the officer remained. This was the case of several; in many of them indeed an excess of caution dictated the superaddition of a new appointment; but where there was no such superaddition, as in the instance of Mr. Dumas, both the office and the officer still remained: for the will of the nation, validly pronounced by the proper organ of the day, had constituted him their agent, and that will has not through any of its successive organs revoked his appointment.³⁶

The complete power of the Executive over the transaction of business pertaining to foreign countries is illustrated by —

The opinion of the Secretary of State on the construction of the powers of the Senate with respect to their agency in appointing Ambassadors &c and fixing the grade.

The Constitution having declared that the President "shall *nominate*, and by and with the advice and consent of the Senate, shall *appoint* Ambassadors, other public Ministers and Consuls," the President desires my opinion whether the Senate has a right to negative the *grade* he may think it expedient to use in a foreign mission, as well as the *person* to be appointed?

I think the Senate has no right to negative the *grade*.

The Constitution has divided the powers of Government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy. The Legislative it has given completely to the Senate and House of Representatives: It has declared that the Executive powers shall be vested in the President, submitting only special articles of it to a negative by the Senate: and it has vested the Judiciary power in the Courts of Justice, with certain exceptions also in favor of the Senate.

The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to

³⁶ Washington Papers, Record Book, Vol. 20. Writings of Jefferson (Ford), V, 438.

such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly. The Constitution itself indeed has taken care to circumscribe this one within very strict limits: for it gives the *nomination* of the foreign Agent to the President — the *appointment* to him and the Senate jointly; and the *commissioning* to the President. This analysis calls our attention to the strict import of each term. To *nominate* must be to *propose*; *appointment* seems to be the act of the will which constitutes or makes the Agent; and the Commission is the public evidence of it. But there are still other Acts previous to those not specially enumerated in the Constitution; towit 1. the destination of a mission to the particular country where the public service calls for it: and, 2nd. the character, or grade to be employed in it. The natural order of all these is 1. destination. 2nd. grade. 3^d nomination. 4th appointment. 5th commission. if *appointment* does not comprehend the neighboring Acts of *nomination* or *commission*, (and the constitution says it shall not, by giving them exclusively to the President) still less can it pretend to comprehend those previous and more remote of *destination* and *grade*. The Constitution analyzing the three last, shews they do not comprehend the two first. The 4th is the only one it submits to the Senate, shaping it into a right to say that "A. or B. is unfit to be appointed, but the grade fixed on is not the fit one to employ" or "our connections with the Country of his destination are not such as to call for any mission." The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them: nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place or of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the President. They are only to see that no unfit person be employed.

It may be objected that the Senate may, by continual negatives on the *person*, do what amounts to a negative on the *grade*: and so indirectly defeat this right of the President. But this would be a breach of trust, an abuse of the power confided to the Senate, of which that body cannot be supposed capable. So the President has a power to convoke the legislature; and the Senate might defeat that power by refusing to come. This equally amounts to a negative on the power of convoking. Yet nobody will say they possess such a negative, or would be capable of usurping it by such oblique means. If the Constitution had meant to give the Senate a negative on the grade or destination, as well as the person, it would have said so in direct terms, and not left it to be effected by a sidewind. It could never mean to give them the use of one power thro' the *abuse* of another.

TH JEFFERSON ³⁷

New York }
April 24 } 1790

³⁷ Washington Papers, Record Book, Vol. 20. See also Writings of Jefferson (Ford), V, 161.

The arrangement of compensation for officers in the foreign service was left to the President, but the act of July 1, 1790, limited the whole amount to be expended to \$40,000 per annum, and specified the maximum salaries. The President was authorized —

To draw from the treasury of the United States, a sum not exceeding forty thousand dollars, annually, to be paid out of the moneys arising from the duties on imports and tonnage, for the support of such persons as he shall commission to serve the United States in foreign parts, and for the expense incident to the business in which they may be employed. *Provided*, That, exclusive of outfit, which shall, in no case, exceed the amount of one year's full salary to the minister plenipotentiary or charge des affaires, to whom the same may be allowed, the president shall not allow to any minister plenipotentiary a greater sum than at the rate of nine thousand dollars per annum, as a compensation for all his personal services, and other expenses; nor a greater sum for the same, than four thousand five hundred dollars per annum to a charge des affaires; nor a greater sum for the same, than one thousand three hundred and fifty dollars per annum to the secretary of any minister plenipotentiary. *And provided, also*, That the president shall account, specifically, for all such expenditures of the said money as, in his judgment, may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before congress annually, and also lodged in the proper office of the treasury department.

SECT. 2. *And be it further enacted*, That this act shall continue and be in force for the space of two years thereafter and no longer.

Jefferson submitted the following to the President:

Observations &c respecting Diplomatic Matters, and the allowances made by Congress.

The bill on the intercourse with foreign nations restrains the President from allowing to Ministers Plenipotentiary or to Chargés des Affaires more than 9000 and 4500 dollars for their personal services and other expences. This definition of the objects for which the allowance is provided, appearing vague, the Secretary of State thought it his duty to confer with the Gentlemen heretofore employed as Ministers in Europe, to obtain from them, in aid of his own information, an enumeration of the expences incident to these offices, and their opinion which of them would be included within the fixed salary, and which would be entitled to be charged separately. He therefore asked a conference with the Vice President, who was acquainted with the residences of London and the Hague, and the Chief-Justice who was acquainted with that of Madrid, which took place yesterday.

The Vice President, Chief Justice, & Secretary of State concurred in opinion that the Salaries named by the Act are much below those of the same grade at the Courts of Europe, and less than the public good requires they should be, consequently, that the expences not included within the definition of the law should be allowed as an additional charge.

1. Couriers, gazetts, translating necessary papers, printing necessary papers, aids to poor Americans; all three agreed that these ought to be allowed as additional charges not included within the phrase "his personal services, and other expences." —

2. Postage, Stationary, Court-fees. — One of the Gentlemen being of opinion that the phrase "personal services & other expences," was meant to comprehend all the *ordinary expences* of the office, considered this second class of expences as *ordinary*, and therefore included in the fixed salary the 1st class before mentioned he had viewed as *extraordinary*. The other two Gentlemen were of opinion this 2^d class was also out of the definition, & might be allowed in addition to the salary — one of them particularly considered the phrase as meaning "personal services personal expences," that is, expences for his personal accommodation, comfort & maintenance. This 2^d class of expences is not within that description.

3. Ceremonies; such as diplomatic and public Dinners, Galas & illuminations. One Gentleman only was of opinion these might be allowed.

The expences of the 1st class may probably amount to about 50 Dollars a year; that of the 2^d to about four or five hundred dollars. Those of the 3^d are so different at different Courts, & so indefinite in all of them that no general estimate can be proposed.

The Secretary of State thought it his duty to lay this information before the President, supposing it might be satisfactory to himself; as well as to the Diplomatic Gentlemen, to leave nothing uncertain as to their allowances; & because too, a previous determination is in some degree necessary to the forming an estimate which may not exceed the whole sum appropriated. Several papers accompany this containing former opinions on this subject.

The Secretary of State has also consulted on the subject of the Morocco consulships, with Mr. Barclay, who furnished him with the note of which a copy accompanies this. Considering all circumstances M^r Barclay is of opinion we had better have only one consul there; and that he should be the one now residing at Morocco, because, as Secretary to the Emperor, he sees him every day & possesses his ear. He is of opinion 600 Dollars a year might suffice for him; & that it should be proposed to him, not as a salary, but as a sum in gross intended to cover his expenses, & to save the trouble of keeping accounts; that this Consul should be authorised to appoint Agents in the Seaports, who would be sufficiently paid by the consignments of vessels. He thinks the Consul at Morocco would most conveniently receive his allowance through the channel of our Chargé at Madrid, on whom also this consulate had better be made dependant for

instructions, information & correspondence, because of the daily intercourse between Morocco and Cadiz.

The Secretary of State, on a view of Mr Barclay's Note, very much doubts the sufficiency of the sum of 600 Dollars; he supposes a little money there may save a great deal; but he is unable to propose any specific augmentation till a view of the whole diplomatic Establishment and its expences, may furnish better grounds for it.

TH: JEFFERSON

17th July, 1790.^{ss}

In 1792 (November 5) Jefferson made a report on the subject of expenditures as follows:

Estimate of the fund of 40,000 Dol. for foreign intercourse, and its application

	D	D
1790 July 1. to 1791 July 1. a year's appropriation.....	40,000	
1791 July 1, to 1792 July 1 do	40,000	
1792 July 1, to 1793 Mar. 3 being 8 $\frac{1}{4}$ months.....	27,000	
		107,000
1790. July 1. to 1791. July 1, actual expenses incurred.....	21,054	
1791. July 1. to 1792 July 1. do	43,431.09	
1792. July 1. to 1793. Mar. 3. the probable expenses may be abt.	26,300	
Surplus unexpended will be about.....	16,214.91	
		107,000

He estimated the ordinary expenses of the different grades of diplomatic missions as follows (dated November 5, 1792):

Estimate of the ordinary expence of the different diplomatic grades, annually.

A Minister Plenipotentiary

D	
Outfit $\frac{1}{4}$ of 9,000.....	1285.71
Salary	9000.
Secretary	1350.
Extras	350.
Return $\frac{1}{4}$ of 2250.....	321.42
	12307.13

^{ss} Washington Papers, Record Book, Vol. 20.

A Resident

D	
Outfit $\frac{1}{2}$ of 4500.....	642.85
Salary	4500.
Extras	350.
Return $\frac{1}{2}$ of 1125.....	180.71
	<hr/>
	5653.56

Agent

D	
Salary	1300
Extras	350
	<hr/>
	1650

Medals to foreign ministers, suppose 5. to be kept here & to be changed once in 7. years will be about 654.6 annually

To support the present establishment would require

D	
for Paris, Minister Plenipot.....	12,307.13
London do	12,307.13
Madrid Resident	5,653.56
Lisbon do	5,653.56
Hague do	5,653.56
Medals to foreign ministers.....	654.6
	<hr/>
	42,229.54

A reduction of the establishment, to bring it within

D	
the limits of 40,000.	
for Paris, a Minister Plenipot.....	12,307.13
London do	12,307.13
Madrid, a Resident	5,653.56
Lisbon, do	5,653.56
Hague, an agent.....	1,650.
Medals to for. ministers.....	654.6
Surplus	1,774.02
	<hr/>
	40,000.

He also made the following:

Estimate of Demands on the Foreign Fund from July 1st, 1790, to March 4, 1793.

	1790-1.	1791-2.	1792-3. 8 months.
France....Salary.....	4,500	6,000	6,000
Secretary of chargé des affaires during his absence in Holland. — Suppose 4 months abt....	248	1,350	900
His expenses on that journey abt.....	675		
Gazettes, postage & other extras abt.....	350	350	240
Outfit to Minister Plenipo.....		9,000	
England. Special Agent, viz:			
Mr. Gouverneur Morris from 1790, Mar. 24 to Sept. 21.....	2,000		
Minister-Plenipo: his outfit.....		9,000	
His salary, suppose from March 1st, 1792.....		3,000	6,000
Extras.....		80	240
His Secretary, suppose from March 1st, 1792.....		450	900
Spain. Chargé des affaires:			
His salary.....	4,500	4,500	3,000
Extras.....	350	350	240
Additional Commissioner, his traveling and tavern expenses. Conjecture.....		1,500	
Portugal. Minister Resident:			
His outfit.....	4,500		
Salary from Febr 21st to July 1st.....	1,625	4,500	3,000
Extras.....	126	350	240
Hague. Agent: his salary.....	1,300	1,300	866
Extras.....	100	100	66
Minister Resident: his outfit.....		4,500	
Salary, suppose from March 1st, 1792.....		1,500	3,000
Extras.....		80	240
Col ^o Humphrey's Agency from Aug ^t 11, 1790 to Febr. 21, 1791, a 2250 Dol ^s p ^r Ann.....	1187.5		
Extras.....	185.		
Foreign Ministers taking leave. Medals.			
Luzerne about.....	1062.5		
Von Berkel.....	697.		
Du Moustier.....	555.5		
	2,315		
	23,956.5	47,910	24,932
Total.....			96,798.5
The Foreign Fund a 40,000 Dolls p. ann. from July 1st, 1791 to Mar. 4, 1793.....			106,666.4
Balance will remain to guard against contingencies.....			29,868.1

This question is further elucidated by the following (dated April 18, 1793):

³⁰ Washington Papers, Record Book, Vol. 21.

The Secretary of State thinking it his duty to communicate to the President his proceedings of the present year for transferring to Europe the annual fund of 40,000 Dollars appropriated to the department of State (a report whereof was unnecessary the two former years, as monies already in the hands of our bankers in Europe were put under his orders)

Reports

That in consequence of the President's order of Mar. 23. he received from the Secretary of the Treasury Mar. 31. a warrant on the Treasury for 39,500 Dollars: that it being necessary to purchase private bills of exchange to transfer the money to Europe, he consulted with persons acquainted with that business, who advised him not to let it be known that he was to purchase bills at all, as it would raise the exchange, and to defer the purchase a few days till the British packet should be gone, on which went bills generally sunk some few percent. He therefore deferred the purchase, or giving any orders for it till Apr. 10, when he engaged Mr. Vaughan (whose line of business enabled him to do it without suspicion) to make the purchase for him: he then delivered the warrant to the Treasurer, & received a credit at the Bank of the U. S. for 39,500 D. whereon he had an account opened between "The Department of State & the Bank of the U S." That Mr. Vaughan procured for him the next day the following bills.

	£ Sterl	Doll
Willing, Morris & Swanwick on John & Francis Baring & Co. London	3000-	for 13,000
Walter Stewart on Joseph Birch—mercht Liverpool.....	400-0 =	1,733. 33
Robert Gilmer & Co. on James Strachan & James Mackenzie, London, indorsed by Mordecai Lewis.....	200 } 150 } 250 }	600-0 = 2,600
	4000-0 =	17,333. 33

averaging 4^s-7 ¹¹/₁₆^d the dollar, or about 2½ per cent above par, which added to the 1. per cent loss heretofore always sustained on the government bills (which allowed but 99 florins, instead of 100 do. for every 40. dollars) will render the fund somewhat larger this year than heretofore: that these bills being drawn on London (for none could be got on Amsterdam but to considerable loss, added to the risk of the present possible situation of that place) he had them made payable to Mr. Pinckney, and inclosed them to him by Capt. Cutting, in the letter of Apr. 12 now communicated to the President, and at the same time wrote the letter of the same date to our bankers at Amsterdam & to Col^o Humphreys, now also communicated to the President, which will place under his view the footing on which this business is put, and which is still subject to any change he may think proper to direct, as neither the letters nor bills are yet gone.

The Secretary of state proposes hereafter to remit in the course of each quarter, 10,000 D. for the ensuing quarter, as that will enable him to take advantage of the times when exchange is low. He proposes to direct at this time a further purchase of 12,166.66 D. (which with the 500 D. formerly obtained & 17,333.33 now remitted, will make 30,000 D of this year's fund) at long sight, which circumstance with the present low rate of exchange will enable him to remit it to advantage.

He has only further to add that he delivered to Mr. Vaughan orders on the bank of the U. S. in favor of the persons themselves from whom the bills were purchased for their respective sums.

This act of 1790 was continued in force in subsequent years, with additional appropriations for specific purposes of foreign intercourse, and the act of May 1, 1810, included consuls to Algiers and other states on the coast of Barbary, the salary being limited to \$4,000 for the consul at Algiers and \$2,000 for those at other states on the Barbary coast; but they were to have no payments whatever for outfits. By this act, also, the President was authorized to make foreign appointments during the recess of the Senate, to "be submitted to the Senate at the next session thereafter, for their advice and consent."

Other consuls were not, at this time, in receipt of regular salaries, their payment coming from the fees of office which they were allowed to collect.

It was the practice of the Secretary of State to make recommendations to the President for consular appointments. The applicants were not many and were usually from merchants resident in the ports. February 23, 1791, in sending a list of applicants, Jefferson recommended that a vice-consul be nominated in this form:

John Culnan, citizen of the U. S. late of its armies, and now a merchant at Teneriffe, to be vice consul of the U. S. for the Canary Islands.

For a consul:

James Yard, of Pennsylvania, to be Consul for the U. S. in the Island of Santa Cruz, and such other parts within the allegiance of his Danish Majesty as shall be nearer thereto than to the residence of any other Consul, or Vice Consul of the U. S. within the same allegiance.⁴⁰

GAILLARD HUNT.

[The next section will be Sometime and Occasional Duties of the Department of State.]

⁴⁰ Washington Papers, Record Book, Vol. 20.

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THE SUCCESSION IN CHINA

During the month of November last a series of important events occurred in the great Empire of China. After a nominal reign of thirty-four years, the Emperor Kwang Hsu died on November 13, and the next day the Empress Dowager Tsi Hsi also died. A considerable part of Kwang Hsu's reign was under a regency, and during his majority he was in poor health. Hence, he depended to a great degree upon the assistance and advice of his aunt, the Dowager Empress, in directing the government of the Empire.

Tsi Hsi was one of the most masterful female rulers of all history. She was the secondary wife of the Emperor Hsien Feng, who died in 1861. She bore him a son, who became Emperor, reigning from 1862 to 1875, and died without issue. The Empress Dowager thereupon caused to be chosen as ruler Kwang Hsu, son of her sister and of Prince

Chun, brother of the Emperor deceased in 1861. This brief sketch of her relation to the Throne shows that Tsi Hsi has been practically the ruler of China for the past half century.

It has been an eventful reign, seldom equaled in the long history of that ancient people. She fled with her husband from Peking in 1860, on the approach of the allied British and French armies, and witnessed his demise from a broken heart over the humiliation of his country. Under her administration the Tai Ping rebellion came to an end, the formidable Mohammedan revolt of ten years later was suppressed, as well as numerous minor movements for the overthrow of the Manchu dynasty, the Empress Dowager showing a courage and skill equal to that of Catharine of Russia. Although the foreign wars and encroachments gave her much anxiety, she met them with a heroic devotion which won the confidence of her statesmen and people.

The recent reforms in the Empire which have so greatly attracted the attention of the outside world, if not directly inspired by her, have been decreed under her authority, and it is understood she heartily entered upon their enforcement. The summons to Peking of Chang Chi-tung and Yuan Shi-kai, the two most powerful and advanced men of the Empire, that she might have them near the Imperial Palace in her last days, was an indication of the spirit which animated her. It was after their arrival that the memorable edict was issued on the 27th of August last proclaiming the intention of the Throne to give a constitution to the country within nine years.

Before his death, Kwang Hsu, with the approval of the Empress Dowager, chose Prince Chun as Regent of the Empire, and named the latter's son, Pu Yi, an infant of three years, to succeed him as Emperor. This act was in accordance with the laws and usages of the Manchu dynasty. There is no heir apparent in China. The reigning sovereign has the right to select before his death or in his will any one of his sons as his successor, and, in default of sons, one of his near kinsmen of the imperial family. Prince Chun, the recently designated Regent, is a younger brother of the late Emperor, two other brothers being still alive. Such a selection is not unusual. The famous Emperor Chien Lung, who died in 1795, after a sixty years' reign, had seventeen sons, and chose the fifteenth son as his successor. Tao Kuang, deceased in 1850, had nine sons and selected the fourth as Emperor.

The name or style of reign selected for the infant Emperor is Hsuan Tung. The cabinet, or grand council, which will advise the Regent

Prince Chun, consists of the following five eminent persons: Prince Ching, a member of the imperial family, president of the Wai Wu-pu, or foreign office; Hsi Suh, a Manchu and a grand secretary; the Viceroy Chang Chi-tung; Lu Chuan-Lin, late viceroy of Szechuan; and Yuan Shi-kai, Minister of Foreign Affairs. The cabinet usually consists of an equal number of Manchu and Chinese members. A vacancy exists by the promotion of Prince Chun to be Regent. These important changes in the state have taken place without any disturbance of the public order or any manifestation of discontent, which augurs well for the country and the Emperor. The Regent has the advantage over all of the preceding rulers of the Empire that he is acquainted with foreign lands, having made a journey to Europe a few years ago, accompanied by Sir Chentung Liang Cheng, late minister to the United States. The liberal and progressive views of the new Regent seem to be shown in his prompt recognition of the recent reform measures of the late Emperor, and especially in his edict declaring his intention to carry forward the preparation for the promised constitution.

In the issue of the JOURNAL for January last a full history was given of the Chinese indemnity and of the action of Congress, in authorizing the remission of about one-half of the amount to which the United States was entitled under the protocol of the powers. Since that date the Chinese Government has been officially advised of the action of the Government of the United States, and in manifestation of the gratitude of the Chinese Government and people a special embassy was sent to Washington to convey to the President their appreciation of his justice and magnanimity. This embassy arrived in December and has delivered to President Roosevelt the thanks of the Emperor.

In addition to this gracious act, the Chinese Government has given notice that it will send to the United States a considerable number of specially selected young Chinese, during the next twenty-five years, to be educated in its schools and colleges. The expenditure for these young men it is estimated will amount to the full sum of the remitted indemnity.

The Special Ambassador Tang Shao-yi, who is at the head of this embassy, is one of the notable men of the Chinese Government. He was educated in the United States about twenty-five years ago, has a perfect knowledge of English, and is fairly well versed in American institutions. His early service for his Government was in Korea as secretary to Yuan Shi-kai, the Chinese resident of that country while still a quasi depend-

ency of China. Other of his diplomatic labors were in the negotiation at Calcutta of the Tibetan convention with Great Britain, and the settlement of Manchurian questions at Peking with Baron Hayashi, the Japanese envoy. Until recently he was junior vice-president of the Wai Wu-pu and controller-general of customs, which posts he relinquished to assume the important and delicate duties of governor at Mukden.

It will commend Tang Yao-yi to the friends of humanity to state that he has been the most active leader in the antiopium crusade. It was his activity which in large degree brought about, under the leadership of Secretary Root, the antiopium international conference at Shanghai.

ARBITRATION TREATY WITH CHINA

October 8, 1908

The United States has made the maintenance of the territorial integrity of China a cardinal part of its foreign policy, not because the United States desires to preserve China as a field for political expansion or commercial development, but because our Government admits the right of China to independence and seeks by all possible and appropriate means to aid the Chinese to realize in the fullest measure the destiny marked out for it in Asia. It is unnecessary to set forth the steps by which China has been opened to the world and the great and honorable part taken by the United States in the movement, as this subject has been carefully considered in a previous issue of the JOURNAL.¹

The result is that China is not only opened to the world, but the great powers which may be supposed to cherish designs against the integrity of China or to obtain exclusive privileges have one by one accepted the American policy as formulated by Secretary Hay and declared in formal and express terms their intention to maintain the integrity of China and the equal opportunity of all nations in the industrial and commercial development of the great Empire.²

The United States has not only maintained the principle of Chinese territorial integrity and equal commercial opportunity, but has concluded a treaty of arbitration with China, thereby recognizing its equality and its claim to a like treatment with other nations. The United States on October 8, 1908, signed a treaty of arbitration with China in accordance with the provisions of article 19 of the convention for the pacific

¹ See editorial on "The Integrity of China and the Open Door," 1, 954-83.

² For the successive steps in the negotiation up to and including the year 1907, see the editorial above referred to.

settlement of international disputes, concluded at The Hague, July 29, 1899, by which the signatory powers reserved the right of concluding agreements with a view to referring to arbitration all questions they should consider possible to submit to arbitration.

As in the various treaties to which the United States is a party, the conventional obligation to arbitrate is limited to a period of five years from the date of the exchange of ratifications (article 3). It has been said that the United States recognizes the equality of China; the truth of that statement is evident from the wording of article 1, which follows:

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties.

It is to be noted that the contracting parties bind themselves to submit questions of a legal nature, or differences relating to the interpretation of treaties existing between them. It will be observed that the agreement to arbitrate is thus general and express, for difficulties concerning extraterritoriality are not excluded. In the draft convention of compulsory arbitration submitted to the first commission at the Second Hague Conference in 1907 extraterritorial rights and privileges were expressly excluded, but upon motion of China and the other nations in which extraterritoriality obtains, seconded by the United States, Germany, and Russia, the provision was stricken from the draft, notwithstanding the opposition of Great Britain. It may well be that extraterritoriality is a political question and, as far as it is not guaranteed by special treaties, may be excluded from the operation of the convention. And it may be also that the term "vital interests" is elastic enough to embrace extraterritoriality and thus exclude controversies involving extraterritorial rights and privileges from the treaty. It is a fact, however, that these rights and privileges are not specifically exempted and China is rightly and properly treated on a plane of equality with the other members of the family of nations.

The second article fixes the arbitral procedure, specifying the "special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure." The final

sentence of the article is national rather than international, for it deals with the internal organ of the United States by which this special agreement is to be framed: "It is understood that such special agreements will be made on the part of the United States by the President of the United States by and with the advice and consent of the Senate thereof."

UNITED STATES AND JAPAN IN THE FAR EAST

Ever since the unfortunate controversy between the United States and Japan concerning the alleged exclusion of Japanese subjects from public schools in San Francisco, the radical press of both countries has teemed with war and rumors of wars. The surest way to bring about war is to discuss its possibility, for the latent patriotism is fanned into flame; statesmen dependent upon popular support for continuance in office feel themselves obliged to satisfy public opinion and prepare in advance to meet an eventuality, however distressing or improbable it may be. The army is increased or reorganized to meet an imaginary evil, and the navy is overhauled and enlarged to prevent the predicted invasion. In such an atmosphere the slightest incident which otherwise would pass unnoticed assumes international importance and significance. An insult to national honor is discovered which does not exist, just as we find in times of controversy a hidden meaning lurking in an otherwise harmless and ordinary statement.

Japan and the United States are to be congratulated in that they have removed by a frank and formal expression of their views any doubt as to their pacific intentions.

The notes exchanged November 30, 1908, by Ambassador Takahira on behalf of Japan and Secretary Root on behalf of the United States are so clear in themselves as to need neither comment nor explanation. They are therefore printed *in extenso*:

NOVEMBER 30, 1908.

SIR: The exchange of views between us, which has taken place at the several interviews which I have recently had the honor of holding with you, has shown that Japan and the United States holding important outlying insular possessions in the region of the Pacific Ocean, the Governments of the two countries are animated by a common aim, policy, and intention in that region.

Believing that a frank avowal of that aim, policy, and intention would not only tend to strengthen the relations of friendship and good neighborhood, which have immemorially existed between Japan and the United States, but would materially contribute to the preservation of the general peace, the Imperial Government

have authorized me to present to you an outline of their understanding of that common aim, policy, and intention:

1. It is the wish of the two Governments to encourage the free and peaceful development of their commerce on the Pacific Ocean.

2. The policy of both Governments, uninfluenced by any aggressive tendencies, is directed to the maintenance of the existing status quo in the region above mentioned and to the defense of the principle of equal opportunity for commerce and industry in China.

3. They are accordingly firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.

4. They are also determined to preserve the common interest of all powers in China by supporting by all pacific means at their disposal the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire.

5. Should any event occur threatening the status quo as above described or the principle of equal opportunity as above defined, it remains for the two Governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.

If the foregoing outline accords with the view of the Government of the United States, I shall be gratified to receive your confirmation.

I take this opportunity to renew to Your Excellency the assurance of my highest consideration.

K. TAKAHIRA.

Honorable ELIHU ROOT,
Secretary of State.

November 30, 1908.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of to-day setting forth the result of the exchange of views between us in our recent interviews defining the understanding of the two Governments in regard to their policy in the region of the Pacific Ocean.

It is a pleasure to inform you that this expression of mutual understanding is welcome to the Government of the United States as appropriate to the happy relations of the two countries and as the occasion for a concise mutual affirmation of that accordant policy respecting the Far East which the two Governments have so frequently declared in the past.

I am happy to be able to confirm to Your Excellency, on behalf of the United States, the declaration of the two Governments embodied in the following words:

1. It is the wish of the two Governments to encourage the free and peaceful development of their commerce on the Pacific Ocean.

2. The policy of both Governments, uninfluenced by any aggressive tendencies, is directed to the maintenance of the existing status quo in the region above mentioned and to the defense of the principle of equal opportunity for commerce and industry in China.

3. They are accordingly firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.

4. They are also determined to preserve the common interests of all powers in

China by supporting by all pacific means at their disposal the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire.

3. Should any event occur threatening the status quo as above described or the principle of equal opportunity as above defined, it remains for the two Governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.

Accept, Excellency, the renewed assurance of my highest consideration.

ELIHU ROOT.

His Excellency,

BARON KOGORO TAKAHIRA,

Japanese Ambassador.

ENGLAND AND RUSSIA IN CENTRAL ASIA

During the last century the Russian and English frontiers in Central Asia slowly but steadily approached until in the last decade their advance guards stood angrily face to face on the "roof of the world" at the western extremity of the Chinese Empire. Happily, in 1895 the Pamir boundary commission reached an amicable agreement, awarding Pamir to Russia and a northwestward extension of Kashmir to England, with a strip between them barely fourteen miles in minimum width left to Afghanistan. This established a buffer for a few miles, but there remained between the advancing frontiers throughout their vast extent the disorderly governments of Persia, Afghanistan, and Tibet, offering opportunity for new encroachments. Mutual suspicion between the peoples of the two countries made such encroachments by their governments almost unavoidable. Every movement by the one, no matter how innocent, was interpreted by the other as an act of hostility. Consular and commercial agents of the two vied with each other in extending their respective influence by securing mining, railroad, telegraph, telephone, and other franchises.

The vague unrest and political agitation in these three decadent countries, due to the infiltration of western ideas, increased the probability of appeals to and interference from the two interested European powers. The liberal factions naturally looked toward England; the reactionaries, toward Russia. In July of 1906 a demonstration of students and ecclesiastics at Teheran, the Persian capital, seconded by the discontented, oppressed, and distressed masses, extracted from the old Shah a promise of a constitutional government. Three months later an elected assembly convened. The death of the Shah a few weeks afterward introduced a

period of uncertainty. The new Shah is a reactionary, but for many months he was too timid to assert himself. Before the middle of the year 1907 revolutionary violence had spread over nearly the entire Empire. The mercenary rule of the despotic satraps, which the corrupt absolutism had fastened on the provinces, everywhere broke down.

In the midst of these disorders, trouble arose with Turkey over the uncertain boundary. The savage Kurds occupying the disputed strip, several miles in width and several hundred in length, claim allegiance to either of the powers as it suits their convenience to escape punishment at the hands of the other. In 1904 they had murdered an American missionary on Persian territory. The Government at Washington demanded of Persia condign punishment of the offenders. The Shah's Government pleaded inability to apprehend. It seemed but an excuse for inaction. For three years the case pended. Finally, in July, 1907, a disorderly semiofficial Persian punitive expedition raided the disputed strip to punish the Kurds for this and other offenses. It was met and scattered by a Turkish army. Pressure from the American, British, and Russian ambassadors at Constantinople alone prevented the Porte from invading Persia in retaliation for this pretended violation of Turkish territory at a time when Persia was wholly unable to defend her claim or prevent a still further extension of the Turkish frontier.

At about the same time the long negotiations between St. Petersburg and London regarding the buffer states in Central Asia reached a happy conclusion in the Anglo-Russian convention. It was signed August 18/31, 1907, and ratified a few weeks later. According to it the two Governments agree to respect the integrity and independence of Persia, but divide that country into spheres of influence; in Afghanistan British influence is recognized as paramount and Russia will have no dealings with that Government except through the British, the latter agreeing not to interfere with the internal government or territory of the Amir; both Powers recognize the suzerainty of China over Tibet, engage to respect its territorial integrity, and agree not to treat with it except through China.¹

When the British Parliament assembled in February, 1908, Sir Edward Grey successfully defended the convention. Certain discontented elements within and a considerable following without held that it had been purchased by too great sacrifices; that its terms were ambigu-

¹ For a discussion and analysis of the convention, see the issue of this JOURNAL for October, 1907; and for the text, see the Supplement to that number.

ous and its value uncertain; that the entire omission of British interests in the Persian Gulf was deplorable. Lord Grey admitted that it contained ambiguities, but declared that if they had waited to eliminate all no conclusion would have been reached. Much the larger and by far the richer portion of Persia had been recognized as within the Russian sphere; this, however, but recognized a fact already accomplished, Russia having actually acquired much more extensive commercial and political influence in the Empire than Great Britain. Although the British sphere was small, yet it included all that was necessary for strategic purposes. The Indian frontier was safe. In Afghanistan nothing is changed except that Russian invasion, commercial as well as military, is made impossible without a breach of treaty. Neither Power lost anything important in Tibet, nor gained anything except security against aggression from the other. The Persian Gulf was not included because it did not touch the frontier of either. The paramountcy of British interests there had been declared by the one and recognized by the other during the negotiations and by a note attached to the convention, virtually made a part of it. The silent but intense and continuous struggle between England and Russia for influence in these three States which had been in progress since the Crimean war, and had caused great anxiety and expense, was ended. Future hostility concerning them was made impossible without a breach of treaty. The existing revolutionary struggle in Persia between the liberal and reactionary elements was almost sure to result in an appeal to one or the other of the Governments and would very likely have resulted in a war for supremacy. A very gratifying element of the situation in England is that the responsible leaders of both parties in both Houses of Parliament are agreed on supporting the convention.

Popular sentiment in both countries, with some little hesitation, accepted the convention and there has been a notable increase in cordiality and friendly intercourse between the two peoples. This was at the same time typified and strengthened by a visit of King Edward to the Czar in the Gulf of Finland in June. The most cordial sentiments were exchanged between the two sovereigns. With a few exceptions the press of both countries commented favorably. The meeting did much to dispel the old feeling that Russia and England were natural enemies.

Meanwhile, events in Persia were proving, even beyond the hopes of the most sanguine, the great value of the *entente*. Revolutionary disorder continued throughout the country. The Shah's opposition to the

Mejliss, or Parliament, became more and more evident. Finally, in December of 1907 a crisis occurred. The Shah refused to dismiss the reactionary advisers who were intriguing against the Cabinet. The Ministry resigned. The Premier and several others were arrested. The deputies in the Mejliss demanded their release. Fighting broke out in the streets, between the constitutionalists and the royalists. The former appealed to the European legations. The British minister demanded the release of the Premier, who had been educated in an English university. He was allowed to depart quietly for Europe. Violent opposition to the Government continued. After a few days, the Shah, fearing a general revolt, once more took the oath to the constitution.

Had it not been for the Anglo-Russian agreement the military faction in Russia, supported by the reactionary court clique, would probably have forced the Czar's Government to interfere on behalf of absolute monarchy. In that event the English military agitators at home and in India, in response to appeals from Persian liberals, would have urged the occupation of the southern part of the country. A conflict would have been all but inevitable.

The parliamentary victory of December had the unhappy effect of making the Mejliss overestimate its power. For several months it remained triumphant. Late in May of last year a group of discarded courtiers decided to demand the dismissal of the existing palace clique. The Mejliss seconded their demand. The Shah yielded, ostensibly, at least, and announced their dismissal on June 2. Two days later he suddenly sallied forth from the palace attended by a military escort and surrounded by the six presumably dismissed courtiers. A royalist camp was formed outside the city and rapidly grew in size. On June 16 the president of the Mejliss, attended by a committee of six, attempted to read a memorial to the Shah. The latter snatched the document, grasped the hilt of his sword, and bade them remember that his predecessors had won their power over Persia by the sword and he would maintain it by the same means if need be.

The ruling Khajar dynasty, as well as the dominant faction throughout the country, are really foreign, being descended from the Mongolian Turks who conquered the country some five or six centuries ago. The subject majority are, in the main, of the original Persian Aryan stock. The dynasty and its adherents have lost both ability and popularity.

A week after the Shah's indignant reception of the Mejliss committee royalist troops surrounded their meeting place. Many liberal leaders

were seized and summarily hanged or shot. Workmen were engaged and the building was razed to the ground. Regulations were promulgated for the election of a new Mejliss to meet within three months. There was probably no intention of keeping the promise. Reactionary administrators were sent to all the provinces to reestablish the absolute régime. Revolutionary activity was resumed in various parts of the country. It was especially active in the northwest about Tabriz, the second city in importance and the chief commercial center. This has been the hotbed of constitutionalism since the movement began. For nearly three months after the *coup d'état* there was little change. The Shah was triumphant. The constitutionalists were cowed.

During this second crisis Great Britain and Russia, both faithful to the agreement, kept aloof, save for the expression of absolutist sympathies by certain insubordinate semiofficial Russian agents not yet in touch with the new policy under the convention.

In September it yielded its first positive results. An identical note presented by the British and Russian legations urgently recommended that the Shah redeem his promise and call an election for a new Mejliss, since the three months were nearly expired. Late in the month the Shah replied, refusing to renew the constitution until the revolution in the northwest, which was becoming more and more menacing, should be subdued.

In response to new admonitions from Russia and England, the reactionary Ministry replied in November that the Shah personally had constitutional tendencies, but that the nation was anticonstitutional. A few days later came the startling declaration that the constitution was entirely abolished, on the ground that it was contrary to the laws of Islam. The British and Russian legations immediately protested against the proclamation. The Shah weakened and ordered it to be withdrawn and all copies destroyed. On December 1 the Persian Minister for Foreign Affairs intimated to the British and Russian ministers that the Shah was willing to concede a new Mejliss. But the next day the suppressed rescript abolishing the constitution was again published. A new, strong joint note from the two legations again induced the Shah to order the rescript withdrawn.

In the meantime, fighting continued between the constitutionalists and royalists in Tabriz and the surrounding province of Azerbaijan. The British consulate at Tabriz attempted to mediate. The Shah refused to promise immunity to the deputies to the next Mejliss, or amnesty to

revolutionaries. Finally, about the middle of last month it was announced that the long-threatened declaration of independence had been issued. A revolutionary republic had been set up composed of the province of Azerbaijan. The populace is rallying to its support. It is expected that other provinces will follow its example.

So far, Russia and Great Britain remain faithful to the convention and preserve a neutrality, which it seems would not have been possible had not diplomacy scored its triumph just in the nick of time.

RECALL OF MINISTERS

The recall of American diplomatic agents is a subject which has been occupying public attention recently. The practice under our Government has been to recall most of the heads of missions when the administration changes, and such a recall has no reference to the character of the services which have been rendered the Government. When the administration passes from one political party to another the changes in the service are sweeping; but when the new administration is of the same political complexion as the old a few heads of missions and many secretaries remain undisturbed. American diplomatic agents are not appointed for a specified term of office, but it is the custom for ambassadors and ministers to place their resignations in the hands of a new President soon after his inauguration. Subordinate diplomatic officers usually wait to be requested to do so before resigning. During recent years a number of secretaries have been promoted to be heads of missions, and, having performed longer diplomatic service than usually falls to the lot of American diplomatic representatives, they may with reason suppose that they have some equitable claim to continuance in the service. Whether the claim will be recognized is a question which will be answered in a few months. In law all members of the diplomatic service have their tenure of office at the pleasure of the President.

Back of the practice of recalling diplomatic agents, when an administration changes, lies the theory, often advanced to support it, that by long residence in a foreign country the agent becomes attached to it and grows lukewarm toward the interests of his own country, and that a more zealous representative is, therefore, to be found in one who comes fresh from the body of the people. In some quarters, also, there is a prejudice — which is, however, diminishing — against the trained diplomat, in the belief that the training has been chiefly in the hollow trivial-

ities of life and has tended to unfit him for solid usefulness. John Adams used to say that militia diplomats often accomplished more than regulars, and Thomas Jefferson, when he was President, laid down the rule that no head of mission should be permitted to serve for more than eight years. The principles involved in these two announcements still survive in America.

THE CASABLANCA INCIDENT AND ITS REFERENCE TO ARBITRATION AT
THE HAGUE

The controversy which for a time troubled the foreign offices of France and Germany, caused by the desertion and arrest on September 25, 1908, of six foreigners from the French foreign legion in Morocco, and the alleged improper assistance furnished them by the German consul, is to be submitted to arbitration at The Hague. The tribunal shall find the facts, apply the law, and determine the situation of the individuals arrested. The submission to arbitration prepared by Messrs. Renault and Kriege, juriconsults of the French and German foreign offices, was concluded November 24, 1908. The text of this important document, which, it is hoped, will be not merely a model but a precedent for the pacific settlement of international controversies, follows:

The Government of the French Republic and the Imperial German Government having agreed, November 10, 1908, to submit to arbitration all the questions raised by the events which occurred at Casablanca, September the 25th, last, the undersigned, thereunto duly authorized, have agreed upon the following *compromis*:

ARTICLE 1. An arbitral tribunal, constituted as hereinafter stated, is empowered to decide the questions of law and fact brought up by the events which occurred between the agents of the two countries at Casablanca, September 25 last.

ART. 2. The arbitral tribunal shall be composed of five arbitrators, chosen from among the members of the permanent court of arbitration at The Hague.

Each Government, as soon as possible and within a period not to exceed fifteen days from the date of the present *compromis*, shall choose two arbitrators of whom one may be its national. The four arbitrators thus chosen shall select an umpire within fifteen days from the date they are notified of their designation.

ART. 3. The 1st of February, 1909, each party shall furnish the bureau of the permanent court with eighteen copies of its *mémoire*, with certified copies of all papers and documents which it intends to bring up in the case. The bureau shall insure their transmission without delay to the arbitrators and parties, that is, two copies for each arbitrator, three copies for each party. Two copies shall remain in the archives of the bureau.

The 1st of April, 1909, the parties shall deposit in the same way their *contre-mémoires* (replies), with the evidence and their final conclusions.

ART. 4. Each party must deposit in the international bureau, at the latest on April 15, 1909, the sum of 8,000 Netherland florins, as an advance on the expenses of litigation.

ART. 5. The tribunal shall meet at The Hague the 1st of May, 1909, and shall immediately proceed to examine the question.

It shall have the power temporarily to proceed, or to delegate one or several of its members to proceed, to such place as seems necessary for the purpose of securing information under the conditions of article 20 of the convention of October 18, 1907, for the pacific settlement of international disputes.

ART. 6. The parties may use the French or German languages.

The members of the tribunal may use, as they choose, the French or German languages. The decisions of the tribunal shall be published in both languages.

ART. 7. Each party shall be represented by a special agent to serve as intermediary between it and the tribunal. These agents shall give explanations as demanded of them by the tribunal and shall present whatever methods they judge useful for the defense of their cause.

ART. 8. As to matters not provided for in the present *compromis*, the provisions of the aforesaid convention of October 18, 1907, which has not yet been ratified, but which has been signed by both France and Germany, shall be applicable to the present arbitration.

ART. 9. After the arbitral tribunal has decided the questions of law and fact which are submitted to it, it shall determine the situation of the individuals arrested September 25 last, in regard to which there is a dispute.

Done in duplicate at Berlin, November 24, 1908.

The tribunal has been selected and will be formed as follows: For Germany, Dr. Kriege and Mr. Fusinato; for France, Professor Louis Renault and Sir Edward Fry. These four have chosen as the fifth member and president of the tribunal, the Swedish diplomat, Knut Hjalmar von Hammarskjöld. The tribunal as constituted is admirable in every respect, for although Messrs. Renault and Kriege are naturally prejudiced in favor of the interests of their countries they are jurists in the highest sense of the word, and may be relied upon to apply impartially a principle of law to the facts found. Mr. Fusinato is professor of international law, a member of the Institute, formerly minister of public instruction, and a very prominent figure at the Second Hague Conference. Sir Edward Fry was for many years a worthy and distinguished lord justice of England, experienced with international arbitration by having acted as judge of the Hague Court and having been connected with the international commission of inquiry. He was present at the Second Hague Conference and worthily represented his country.

He is a jurist by education and instinct. The same may be said of Mr. Hammarskjöld, who has held high judicial position in Sweden, and was one time minister of justice in the cabinet.

If the tribunal be regarded as an international commission of inquiry it is to be noted that the contracting Powers agree to have the facts in controversy found as well as the question of responsibility, thereby following the example of Russia and Great Britain in the Dogger Bank incident. Attempts were made in 1899 to make a resort to a commission of inquiry obligatory, but the opposition of the Balkan States frustrated the attempt. At the Second Conference of 1907 Russia proposed that the commission of inquiry be invested with the power to determine responsibility as well as to ascertain the facts in controversy. The Russian proposal met with opposition and was not adopted. It is to be observed, however, that Great Britain and Russia empowered the commission to find responsibility, and we now have France and Germany conferring like powers upon a commission of inquiry. It is to be hoped that the smaller states will follow the example of the great powers and find it possible to submit the question of responsibility without violating the principle of sovereignty to which they attach an almost incomprehensible reverence.

If, on the other hand, the tribunal is to be regarded as a court in the proper sense of the word, it is to be noted that article 5 permits the tribunal to transport itself to the scene of the controversy or to delegate one or several of its members as provided by article 20 of the convention of October 18, 1907, concerning commissions of inquiry. The opposition of Germany in 1899 to the permanent court seems to be a thing of the past, for Germany has already been a party to two international arbitrations at The Hague, namely, with Venezuela in the case of Germany, Great Britain, and Italy v. Venezuela et al.,¹ and with Japan in the case of Great Britain, France, and Germany v. Japan.² It now arbitrates with France, supposed to be its inveterate enemy. The forthcoming arbitration is therefore no ordinary event.

The Moroccan question in its larger aspects, resulting from the change of government, is reserved for a future comment, in order that the necessary documents may be printed in the Supplement and referred to in the editorial.

¹ See this JOURNAL, 2, 902.

² *Idem*, 2, 911.

THE NOBEL PRIZE

The Swedish scientist, Alfred B. Nobel, inventor of dynamite, died December 10, 1896, and established by his will a fund of approximately nine million dollars, the interest of which should every year be distributed to those who had contributed most to "the good of humanity." The interest thus provided for was to be divided into five equal shares and distributed "one to the person who in the domain of physics has made the most important discovery or invention, one to the person who has made the most important chemical discovery or invention, one to the person who has made the most important discovery in the domain of medicine or physiology, one to the person who in literature has provided the most excellent work of an idealistic tendency, and *one to the person who has worked most or best for the fraternization of nations, and the abolition or reduction of standing armies, and the calling in and propagating of peace congresses.*"

The fund became available in the year 1901, and the individual prize, amounting to \$40,000, is awarded annually on December 10, the anniversary of Mr. Nobel's death, sometimes to a single individual, at other times divided between two laureates, and in one notable instance to an institution (the Institute of International Law, 1904).¹

On December 10, 1908, the peace prize was divided between K. P. Arnoldson, of Sweden, and M. F. Bajer, of Denmark. The life work of Messrs. Arnoldson and Bajer brings them within the letter as well as the spirit of the prize, for they have devoted themselves with singleness of purpose to the establishment of peace societies, calculated not only to bring the nations into closer touch, but to eliminate the artificial barriers unfortunately separating them.

Klaus Pontus Arnoldson was born in 1844 and as politician and writer he has espoused the cause of peace. In 1883 he established the Swedish Peace and Arbitration Union, and in numerous writings he has expounded the necessity, the advantages, and the possibility of international peace. Among these may be mentioned "The Peace Movement" (1883); "Is International Peace Possible?" (1890); "Law, not War" (1890); "Cain, the Hero of the Day" (1891); "Pax Mundi," in English (1892); "The Hope of the Centuries" (1901).

Frederik Bajer was born in 1837, and has had a distinguished and varied career. He is president of the International Peace Bureau at

¹ For recipients of prize, see editorial in this JOURNAL, 2, 152.

Berne, member of the International Peace Union in Monaco, member of the Interparliamentary Council, president of the Danish Interparliamentary Group. He knows the advantages of peace, because from 1856 to 1864 he served as an officer in the army and in the war of 1864 took part in the campaign at Schleswig, Veile, and Horsens. Leaving the army he entered public life, and from 1872 to 1895 was a member of the Danish Parliament. At the present moment he holds a distinguished and important position in the Ministry of Foreign Affairs of his country. In 1882 he established the Danish Peace Society, and was likewise founder of the International Peace Bureau at Berne (1891). In Parliament he not only espoused the peace idea in general, but insisted upon the negotiation of arbitration treaties. He has been an indefatigable worker for the peace congresses due to private initiative, and has attended regularly the meetings of the Interparliamentary Union. As a writer he has contributed many articles in Danish, Swedish, French, and German to the cause of peace.

The mere statement of the activity of these distinguished gentlemen not only demonstrates their fitness, but justifies the committee in dividing the prize between them.

THE FIFTEENTH CONFERENCE OF THE INTERPARLIAMENTARY UNION

There are current in the world two opposite opinions regarding the nature and purpose of the state. One of these is that the state is founded upon force, exists only by its might, and that its highest interest lies in the domination of the largest possible number of human beings and the widest possible extent of territory. The other is that the state is founded upon the inherent right of men to life, property, and the free exercise of their faculties, for whose protection alone the state exists, and that it is, therefore, an ethical organism for whose defense force may, if necessary, be employed, but whose essential aim is the further development rather than the subjection of mankind.

According as men accept one or the other of these two conceptions of the state will be their judgment upon the wisdom or folly of that fraternity of the legislators of different countries known as the Interparliamentary Union. If it be true that might is right, that the state knows no law but its own interests, and that its own indefinite expansion and triumph in the struggle for supremacy are its chief motives, it is difficult to see that the deliberations of this and other international

assemblies having for their purpose common action toward the realization of higher civic ideals contain much promise of utility. If, on the other hand, the state is a judicial entity, with reciprocal rights and duties, in a society composed of equals, nothing can be more promising than the union of those who make the laws of civilized countries in the endeavor so to shape the attitude and conduct of all toward one another as to extend to their relations the great principles of jurisprudence which they are accustomed to apply within the sphere of their own jurisdiction.

One may, therefore, regard the amount of public interest in the deliberations of such a body as a just measure of the degree of civilization — as civilization is conceived by the jurist — to which civil societies have thus far attained. Judged by this test, the Fifteenth Conference of the Interparliamentary Union, assembled in Berlin from September 17 to September 19, offers to the world a new proof of the vitality and growth of the juristic idea and marks a manifest advance towards its realization in international affairs.

On August 30, in his notable speech at Strassburg, His Majesty the German Emperor sounded a note of encouragement to all who hope for the pacific development of international intercourse when he emphasized the guaranty of peace to be found "in the consciences of the princes and statesmen of Europe, who know and feel that they are responsible to God for the lives and prosperity of the peoples intrusted to their leadership." It does not diminish but rather increases the significance of this utterance that it was addressed mainly to soldiers, of whose "manly discipline and love of honor" the Emperor spoke with pride as "without menace to others."

Closely following this tribute of strength to the principles of peace, justice and humanity by the German Emperor came the opening address to the Interparliamentary Conference by the Imperial Chancellor, Prince von Bülow. Choosing the French language, of which he is a graceful master, as his medium of expression, the Chancellor cordially welcomed the representatives of the foreign parliaments, who filled the hall of the Reichstag, to the hospitality of the Empire and its capital with the assurance that Germany, with the rest of the civilized world, appreciates the services which the Union is rendering to a noble cause. As the climax to his graceful tribute to M. Frédéric Passy, the venerable dean of that body, the Chancellor defined this cause to be that of "obtaining guaranties for peace and concord among the nations." Difficult as the task of the Union has been recognized to be, the speaker offered his con-

gratulations upon the progress that has been already made, and gave assurance that not only the peoples but the governments were in accord with its high aim. Only with respect to the means to be employed were there any divergences of opinion; and as regards the principle of international arbitration, voluntary or obligatory, Germany had given evidence by treaties already signed of accord and cooperation in the adoption of "all propositions compatible with the interests of legitimate defense as well as with the imprescriptible laws of humanity." As further proof of the interest of Germany in this cause was the ever-increasing number of German deputies who desire to form a part of the Interparliamentary Union. Between the love of peace and the duties of patriotism there is no conflict, for true patriots endeavor to prevent strife by combatting ignorance, revenge, blind hatred, and "ambitions sometimes deceptive." As for Germany, taught by the cruel lessons of the past, she wishes to be strong enough to defend her soil, her dignity and her independence; "she does not, she will not, misuse her force."

Supported by the words addressed by the King of England to the last conference of the Interparliamentary Union — "a ruler can set before himself no higher aim than the promotion of good understanding and most hearty friendship between the nations" — quoted by Prince Heinrich zu Schönlaich-Carolath in his presidential address in opening the conference, the spirit of concord expressed in the Chancellor's utterance became the key-note of all the sessions. Of the public and private hospitality manifested by the city of Berlin and the members of the German Reichstag it is only necessary to say that the guests were received and entertained with generous cordiality, and that no one of the previous conferences was more thoroughly enjoyed by those who participated in it.

The extent and character of the notice accorded to this assembly by the Berlin press was an agreeable surprise to all the foreigners present, and the interest of the general public seemed to grow from day to day. About fifteen hundred persons were present at the reception offered by the Imperial Chancellor in the garden of his palace, including most of the chief officers of the Empire then present in Berlin.

With regard to the program and decisions of the conference, it is impossible within the limits of this article to speak in detail. The work of the Second Hague Conference received unqualified approbation and its results were esteemed to offer great encouragement for the future. The proposed plan for a permanent international court was warmly commended, a general treaty for obligatory arbitration was urged, and the

further consideration of the immunity of private property at sea by the next Hague Conference was earnestly favored.

Two incidents deserve special mention.

An eloquent letter from Mr. Andrew Carnegie was read, in which that eminent advocate of the pacific adjustment of differences between nations suggested the possibility of preventing future wars through the organization of a league of peace to be initiated by the German Emperor. This proposition evoked the assertion by a delegate that no single potentate was in a position to secure the peace of the world, and that such an endeavor on the part of Germany might create distrust among other nations. It was not affirmed, however, that such a league is intrinsically impossible; and tribute was paid to the idea of such an expedient by the declaration that when the world is ready for universal peace no single power could prevent its consummation.

The other incident was the proposition of the Roumanian delegate, Mr. Diesco, that the Czar of Russia should take the initiative in calling the next conference at The Hague and propose the program to be followed. Professor Quidde of Munich suggested that this proposition be referred to the general council, adding that it was, perhaps, not desirable to address this request to the Czar, and that it might be quite as appropriate to address it either to the President of the United States or the Queen of the Netherlands. The Danish delegate, Mr. Beier, supported this suggestion. Mr. Diesco replied that Russia was a country which possessed a historical conscience and followed historical tradition, and that the President of the United States had voluntarily remitted the preliminaries of the last conference at The Hague to the Czar of Russia. Further, in the final act of the last Hague Conference, he declared, it was formally provided that the Czar should convoke the next one; and, it was urged, the propriety of this must be conceded, since the Hague conferences were his work. The subject was finally referred to the council.

The wish is father to the thought, and the learned delegate of Roumania treads manfully in the footsteps of Mr. Beldiman, who endeavored in the Sixth Plenary Session (The Second Peace Conference, Acts and Documents, I:169 *et seq.*) of the Second Hague Conference to secure for Russia the initiative in summoning all future conferences, and who considered the "august initiative as acquired." Mr. Mérey went so far as to say in the name of the Austrian-Hungarian delegation that "we consider the initiative of Russia as definitively acquired in this matter."

The delegations generally paid their respects to Russia as the initiator of the conference idea. It must be remembered, however, that the recommendation speaks for itself and in the recommendation for a future conference Russia is mentioned neither directly nor indirectly. The learned delegate refers to the final act as consecrating Russian initiative. The final act states in unmistakable language that the second conference was proposed in the first instance by the President of the United States of America, that it was convoked by Her Majesty the Queen of the Netherlands, upon the invitation of His Majesty the Emperor of All the Russias. The diplomatic correspondence leading to the second conference shows that President Roosevelt took the initiative, that he issued the call on October 21, 1904, and that the various nations represented at the first conference expressed their willingness to attend a second as stated by President Roosevelt in the second circular letter, dated December 16, 1904. It further appears, as the delegate himself admits, that President Roosevelt renounced the initiative to Russia upon the request of Russia, as stated in a Russian memorandum presented to the President, September 13, 1905, and from the answer of the Secretary of State, dated October 12, 1905. It is not meant to suggest that the initiative taken by President Roosevelt in 1904 confers any permanent right upon the President of the United States to summon the third conference; it is insisted, however, that no nation possesses the exclusive right to initiate or summon this conference and that the expressed language of the final act, far from consecrating the Russian initiative, is an authority to the contrary. The language of the recommendation must be interpreted as any legal document, and if it be interpreted in the light of the final act as suggested by the Roumanian delegate, it would appear that any state represented at the first or second conference may take the initiative. It is important that this be clearly understood, for the conference as an institution should not depend upon any power, whether it be Russia or the United States. It should meet when international opinion requires it to meet, irrespective of the desire of any particular state. No discourtesy is meant to Russia by this simple comment. The original conference was due to the sole initiative of Russia, and the world owes the Czar a debt of gratitude. Finally, it may be said that if, as alleged, the question is already settled in the final act of the Hague Conference, it is difficult to understand why it should be raised in the Parliamentary Union.

Among the amenities of the conference was the presentation of a

peace-flag sent by the American group to the German group, accompanied by a graceful address delivered in German by Representative Richard Bartholdt in which the historic friendship and community of sentiments between the two countries were emphasized.

Of the many great truths uttered during this memorable gathering the most worthy of remembrance, perhaps, is the assertion of the German Chancellor that there is no contradiction between the highest patriotism and the common desire of the nations for peace with their neighbors. It has long been evident that what is most needed to secure the peace of the world is the growth of confidence in the good intentions and the sincerity of all the governments, and this confidence can rest upon no more secure foundation than the honor of the rulers and statesmen who direct their course.

Upon this point we may profitably weigh the words of the German Chancellor when he says: "A rather long experience has convinced me that nothing is so well adapted to destroy misunderstandings as to become acquainted with one another through the establishment of personal relations." This is the aim of the Interparliamentary Union, which periodically brings into contact the representatives of the legislative bodies of different countries. It is a valuable supplement to that continuous personal intercourse which permanent diplomatic missions are intended to promote, and has for its object the same purpose, namely, the consolidation of friendship and the interpretation of the national aims, so likely if not understood to create misapprehension.

It is an auspicious sign of the times that the British Parliament has appropriated three hundred pounds to meet the expenses of the next conference, an example which will no doubt be followed by other nations. If a small fraction of the money expended in preparations for wars which all good men hope may be averted were applied to the direct cultivation of the normal relations which most effectively tend to prevent them, the ends of civilization would be more speedily realized and at far less expense.

THE INSTITUTE OF INTERNATIONAL LAW

The Institute of International Law, composed of specialists in international law selected from the nations at large, held its twenty-fourth session at Florence in the last days of September.¹ The Institute opened on September 28 and was largely attended by its members and associates.

¹ For the origin and purpose of the Institute of International Law, see editorial, this JOURNAL, 1, 135.

The general secretary, Prof. Albéric Rolin, reported upon the work of the institute during the two years which had elapsed since its meeting at Ghent in 1906, and called attention to the order of business, which dealt in the domain of international law proper, with submarine mines, treaties of arbitration, defaulting states, occupation of territories, foreigners in belligerent service, and neutrality; in the domain of conflict of laws, with obligations, movable property, penal law, "ordre public," personal capacity, change of nationality, double taxation, etc. M. Rolin stated that several of the committees had not been able to complete their labors and that the program was one which could not be disposed of in a single session. Of the seventeen topics before the committees only six were taken into consideration, most of them dealing with private international law.

The elaborate report of M. Albéric Rolin upon the conflict of laws *en matière d'obligations* was substantially adopted so far as it related to obligations *ex contractu*, but obligations *quasi ex contractu* and *ex lege* were reserved for future treatment. M. Corsi's report upon the laws which should regulate the obligations between citizens or subjects of different states arising from insurance against accident to workmen was referred back to his committee after receiving various amendments. The illness of M. De Lapradelle prevented the discussion of the rights and duties of neutrals which has so long commanded the attention of the institute. The report of M. Edouard Rolin, the editor in chief of the *Revue de Droit International et de Législation Comparée*, upon the position of foreigners in the service of belligerents was carried unanimously so far as to assimilate the status of foreigners in belligerent service to the status of nationals in like service. The subject was referred to the committee with instructions to work out the details involved by the adoption of the general principle. M. Strisower's report upon double taxation was referred back to the committee with instruction to confine itself to the question of rights of succession.

In the domain of international law proper the institute approved the committee's draft upon the employment of mines in naval warfare, a question carefully considered by the institute at Ghent in 1906.² The question of submarine mines was the subject of a convention at the Second Hague Conference, and it was therefore indispensable to consider the topic not only in the light of the institute's previous action, but from the standpoint of the Hague Conference. The importance of the sub-

² See *Annuaire*, 21, 88-99, 330-345.

ject, therefore, is very great, and the provisional draft will be reconsidered at the next meeting of the institute at Paris in 1910. The draft as approved by the institute follows:

ARTICLE 1. Il est interdit de placer en pleine mer les mines automatiques de contact amarrées ou non.

ART. 2. Les belligérants peuvent pour des raisons stratégiques (1) placer des mines dans leurs eaux territoriales ou dans celles de l'ennemi; (2) mais il leur est interdit:

a. De placer des mines automatiques de contact non amarrées, à moins qu'elles ne soient construites de manière à devenir inoffensives une heure au maximum après que celui qui les a placées en aura perdu le contrôle;

b. De placer des mines automatiques de contact amarrées, qui ne deviennent pas inoffensives dès qu'elles auront rompu leurs amarres.

ART. 3. Il est toujours interdit, tant en pleine mer que dans les eaux territoriales, d'employer des torpilles qui ne deviennent pas inoffensives lorsqu'elles auront manqué leur but.

ART. 4. Il est interdit de placer des mines automatiques de contact devant les côtes et les ports de l'adversaire, dans le seul but d'intercepter la navigation de Commerce.

ART. 5. Lorsque les mines automatiques de contact amarrées sont employées, toutes les précautions doivent être prises pour la sécurité de la navigation pacifique.

ART. 6. Toute Puissance neutre qui place des mines automatiques de contact devant ses côtes doit observer les mêmes règles et prendre les mêmes précautions que celles qui sont imposées aux belligérants.

ART. 7. L'obligation de la notification incombe à l'État belligérant aussi bien qu'à l'État neutre.

ART. 8. À la fin de la guerre, les Puissances contractantes s'engagent à faire tout ce qui dépend d'elles pour enlever, chacune de son côté, les mines qu'elles ont placées.

Quant aux mines automatiques de contact amarrées que l'un des belligérants aurait posées le long des côtes de l'autre, l'emplacement en sera notifié à l'autre Partie par la Puissance qui les a posées et chaque Puissance devra procéder dans le plus bref délai à l'enlèvement des mines qui se trouvent dans ses eaux.

ART. 9. Les Puissances contractantes, qui ne disposent pas encore de mines perfectionnées telles qu'elles sont prévues dans la présente Convention, et qui, par conséquent, ne sauraient actuellement se conformer aux règles établies dans les Art. 1 et 3, s'engagent à transformer, aussitôt que possible, leur matériel de mines, afin qu'il réponde aux prescriptions susmentionnées.

ART. 10. La violation de l'une des règles qui précèdent entraîne la responsabilité de l'État fautif.

It is interesting to compare the project of the institute with the convention adopted at The Hague, for the text of which see this *JOURNAL*, Supplement, 2, 138.

M. Lyon Caen was elected president and Professor Thomas Erskine Holland vice-president. The following members and associates were likewise elected:

Members (with date of election as associate in parentheses).—Messrs. Beauchet (1892), Corsi (1898), Fauchille (1897), Lawrence (1885), de Liszt (1900), J. B. Moore (1891), Olivi (1891), and Strisower (1891).

Associates.—Messrs. Anzilotti, professor at Bologna; Diena, professor at Siena; Fedozzi, professor at Palermo; Fromageot, technical delegate for France at the Second Hague Conference; Huber, professor at Basel; Mercier, professor at Lausanne; Oppenheim, professor at Cambridge; J. B. Scott, technical delegate for the United States at the Second Hague Conference and solicitor for the Department of State; Takahashi, professor at Tokio; Triepel, professor at Tübingen; Zeballos, professor at Buenos Ayres.

THE INTERNATIONAL LAW ASSOCIATION

The International Law Association held its twenty-fifth session at Budapest in the last week of September. This very influential association was founded in 1873, the year of the foundation of the Institute of International Law,¹ and year by year has justified its creation. Many and valuable papers have been read before it and the public reports of its proceedings are of value to jurists as well as to students of international law.

The twenty-fifth meeting of the association was no exception to the rule. For example, among the subjects discussed were the following: The question of blockade, by Lord Justice Kennedy, forming the third of a series contributed by him to these conferences; a paper on the international prize court by Sir Thomas Barclay, in which that learned authority characterized the court as revolutionary, and criticized Great Britain for being a party to it; political offenses in extradition treaties; bills of exchange; the enforcement of foreign judgments; the question of divorce jurisdiction; the legal position of shipmasters and mariners; the strike clause in relation to demurrage; workmen's compensation; double taxation; the claims of competing *fisci* to lapsed personalty; and foreign companies in Egypt.

Of these important subjects three are selected for special comment: Lord Justice Kennedy's paper on blockade, extradition of political offenders, and bills of exchange.

¹ See editorial, this JOURNAL, 1, 135.

Lord Justice Kennedy briefly described the three essential conditions of a blockade — namely, effectiveness; notice, actual or constructive; and impartial exercise. He next called attention to the doctrine of continuous voyages as applicable in the matter of contraband and the extension of the doctrine of continuous voyages to blockade. The learned justice approved the doctrine of continuous voyages in the matter of contraband and justified the capture by a belligerent of a neutral vessel proceeding to a neutral port of final destination carrying a cargo consisting wholly or in part of contraband destined by the shipper for the use of the belligerent, and intended to be forwarded to the enemy from the vessel's port of discharge. He, however, disapproved the extension of the doctrine of continuous voyage to a cargo not of a contraband nature but consigned by its shipper to agents at the vessel's port of destination, even although it was the shipper's intention that the cargo be transshipped at a neutral port with the intent to run a blockade. The Anglo-American jurisprudence permits capture from the moment the vessel leaves territorial waters. The French or continental view permits capture and confiscation only within the immediate presence of the blockading squadron and port. The learned justice suggested a compromise between these doctrines by providing that the belligerent's notification of the blockade shall specify a zone within which the blockading force could operate and entry into which would subject all vessels to capture and condemnation unless it be clearly proved that they were not attempting to enter the blockaded port.

Mr. J. A. Barratt, in his interesting paper on extradition, insisted that some limitation is required to the clause which at present exists in most extradition treaties whereby political offenses are excluded; that the growth of anarchism demanded a modification of the existing practice, and he suggested that the modification of the clause be accompanied by provisions insuring that the prisoner after surrender be tried in a uniform and proper manner. The importance of the question led to the passage of the resolution that "it be referred to the executive council of the association to appoint a committee to consider and report upon the subject of extradition with special reference to the matters discussed in the papers presented to this conference, such report to be presented to a future conference."

The most important matter discussed was the question of bills of exchange, and the conclusions of the conference known as the "Budapesth rules" follow:

1. The capacity to contract by means of a bill of exchange shall be determined by general capacity to enter into a contract, but a person, although incapable of binding himself by such a contract in his own country, shall also be bound if he is capable of so binding himself under the law of the country in which he contracts.

2. To constitute a bill of exchange it shall be necessary to insert on the face of the instrument the words, "Bill of exchange," or their equivalent.

3. It shall not be obligatory to insert on the face of the instrument or on any endorsement the words, "Value received," nor to state a consideration.

4. Usances shall be abolished.

5. It is desirable that the validity of a bill of exchange should not be affected by the absence or insufficiency of a stamp.

6. A bill of exchange shall be deemed negotiable to order unless restricted in express words on the face of the instrument or on an endorsement.

7. The making of a bill of exchange to bearer shall be allowed.

8. A bill of exchange shall be negotiable by blank endorsement.

9. The bill of exchange shall not be invalid by reason that it is not dated or does not specify the place where it is drawn or the place where it is payable.

10. The rule of law of *distantia loci* shall not apply to bills of exchange.

11. The mere fact that the bill of exchange was overdue at the time of an endorsement shall not affect the character of the endorsement as such.

12. The acceptance of a bill of exchange must be in writing on the bill itself. The signature of the drawee (without additional words) shall constitute acceptance, if written on the face of the bill.

13. The drawee may accept for a less sum than the amount of the bill. Any other restriction shall be equivalent to refusal.

14. In case of dishonor for nonacceptance or for conditional acceptance, the holder shall have an immediate right of action against the drawer, the endorsers, and any other parties liable for payment of the amount of the bill and expenses, less discount.

15. Where an acceptance is written on a bill and the drawee has parted with the possession of it or has given written notice to or according to the directions of the person entitled to the bill, that he has accepted it, the cancellation of the acceptance shall be of no effect.

16. Where the acceptor shall have committed an act of bankruptcy before due date, the holder shall have an immediate right of action against the drawer, the endorsers, and any other parties liable, for payment of the amount of the bill and expenses, less discount.

17. No days of grace shall be allowed.

18. Protest, or noting for protest according to the law of the country, shall be necessary to preserve the right of recourse upon a bill of exchange dishonored for nonacceptance or for nonpayment.

19. Immediate notice of dishonor must be given; if it be not so given, the party sued shall be discharged to the extent of the loss or damage caused by the want of such notice.

20. The time within which protest must be made shall be extended in the case of *vis major* during the time of the cause of interruption.

21. There shall be no obligation to give a set or a duplicate without an agreement between the parties thereto. But where a bill has been lost before it is overdue, the person who was the holder of it shall be entitled to require of the drawer another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever, in case the bill alleged to have been lost shall be found again. No annulling clause need be inserted in duplicates if marked as such.

22. The holder of a bill of exchange shall not be bound in seeking recourse by the order of succession of the endorsements, nor by any prior election.

23. A simultaneous right of action on a bill of exchange shall be allowed against all or some or any one of the parties to the bill.

24. The *donneur d'aval* (surety upon a bill of exchange) shall be equally liable with the person whose surety he is.

25. The owner of a lost or destroyed bill of exchange has, upon giving security, a right to payment of the bill by the acceptor, and the same right against the drawer as he would have had if the bill had not been lost or destroyed.

26. The limitation of actions upon bills of exchange against all the parties shall be 18 months from due date.

27. In the foregoing articles the term bill of exchange shall include promissory notes, where such interpretation is applicable, but shall not apply to cheques.

It was decided that the executive council should communicate the rules to the various governments, especially the Dutch Government, which intends to invite — and actually has invited — the other governments to an international conference on the subject.

THE ANNUAL MEETING OF THE SOCIETY OF INTERNATIONAL LAW

The third annual meeting of the American Society of International Law will be held at the New Willard Hotel, Washington, D. C., Friday and Saturday, April 23 and 24, 1909. There will be three sessions on Friday, the 23d, beginning, respectively, at ten in the morning, half-past two, and eight in the evening. There will be but one session on Saturday, beginning at ten in the morning. In the afternoon it is expected that the President will receive the members of the Society at the White House, and in the evening at half-past seven the annual banquet will be held.

The program of the meeting, together with the names of those who take part in the proceedings and the speakers at the banquet, will be shortly sent to every member of the Society in the hope that a notice so far in advance will enable the members to attend more largely than formerly. The tentative program follows:

FRIDAY, APRIL 23, 1909

Ten o'clock

Presidential address.

Topic: Arbitration as a judicial remedy: an examination of concrete cases actually submitted and decided by arbitration; how far they are of a judicial character and how far they have been governed by diplomatic convenience.

Half-past two o'clock

Topic: The nature and definition of political offense in international extradition.

Eight o'clock

General address:

The development of international law by judicial decisions in the United States:

1. The Supreme Court.
2. The Court of Claims.

SATURDAY, APRIL 24, 1909

Ten o'clock

Topic: The constitution and powers which an international court of arbitral justice should possess.

Topic: The equality of nations.

Half-past two o'clock

Reception by the President of the United States to the members of the Society at the White House.

Half-past seven o'clock

Banquet at the New Willard Hotel.

The committee in charge of the program has aimed to give continuity to its proceedings and make the published volume containing them of permanent value. It is a commonplace that international disputes should be arbitrated rather than settled by force, but to be effective arbitration should be a judicial method. Negotiation and compromise belong to diplomacy, not to the law court. The committee therefore has decided to submit arbitral decisions to a careful and searching examination in order to ascertain in how far arbitration has been judicial and in how far, judged by concrete cases, nations have submitted and therefore are willing to submit international controversies to judicial settlement. Having thus shown that international disputes are constantly settled by

arbitration and that arbitration either is or should be judicial rather than diplomatic, Saturday morning's session will be devoted to a consideration of the question whether a permanent court rather than temporary commissions should not be constituted in which nation may sue nation without the embarrassment and delay necessarily involved in the selection of judges and the constitution of a court.

In the next place the composition and necessary powers of the court will receive careful consideration, and it is hoped that members of the Society — perhaps the Society itself — will express its views upon the modification in actual practice of the theoretical equality of states. If a permanent court could be composed of one member from each nation the problem would be simple, but to be wieldy and serviceable the judges can not well represent more than a third of the nations at one time. The great difficulty is therefore to devise a method of composition acceptable to all members of the family of nations. It is the hope of the committee that the leading papers and the discussions upon the floor will throw light upon the subject and that they will in printed form appeal to a large circle of readers.

The occasional request for extradition of a fugitive for an alleged political offense makes the question of "the nature and definition of political offense in international extradition" timely as well as important. The subject is timely because the fugitive pleads the political nature of his offense if there be the slightest justification for it. The subject is important because our treaties of extradition forbid the surrender of the fugitive for the commission of a political offense. It is therefore essential that the nature and definition of a political offense be clearly understood.

It is frequently stated that the Supreme Court of the United States is the prototype of a supreme court of nations, and partisans of an international tribunal refer with pleasure and pride to our Supreme Court. As the Constitution provides that members of the American Union may sue and be sued in the Supreme Court, and as the causes of suit may be infinitely varied, it follows that the Supreme Court is often called upon to render decisions of great importance to international law. If we bear in mind that the Supreme Court has original jurisdiction "in all cases affecting ambassadors, other public ministers and counsels, and those in which a State shall be a party," it is obvious that the Supreme Court of the United States must deal with many and intricate questions of international law. It is therefore not only interesting but important that the functions of the Supreme Court in the development of inter-

national law be made clear. As the United States is suable in its Court of Claims, and as many international claims have been decided by this tribunal, a survey of its jurisdiction and important decisions will be of genuine interest to students of international law.

As every paper is open to discussion, it is not unreasonable to expect that the third annual meeting of the Society will be both interesting and profitable.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

July, 1908.

- 1 CHINA. New regulations concerning introduction of arms and munitions into China take effect. Text in *B. del ministero degli affari esteri*, Rome, August, 1908.
- 5 ITALY. Decree giving execution to arrangement signed at Rome December 9, 1907, for creation of an international office of public hygiene with seat at Paris. *Ga. Ufficiale*, July 15; *B. del ministero degli affari esteri*, July, 1908; *R. di dr. int.* 3:193, which contains the organic statutes of the office. Ratifications have been deposited at Rome by Italy, France, Belgium, Switzerland, Great Britain, Russia, Brazil, Spain, and United States. This convention was drawn up at the sixth international sanitary conference which met in Rome, December 3, 1907, with the aim of providing for such an institution, which had already been agreed upon in principle at the fifth conference held at Paris in 1903. The office will be directed by a committee composed of delegates from all the countries participating in its formation. See *December 9, 1907, and November 17, 1908. J. O.*, December 11.
- 10 INTERNATIONAL CONFERENCE ON BIBLIOGRAPHY at Brussels. *Polybiblion, Partie littéraire*, 67:275.

July, 1908.

- 11 NETHERLANDS. Law approving international convention signed at Berne September 26, 1908, respecting prohibition of use of white phosphorus in manufacture of matches. Signatory powers: Germany, Denmark, France, Italy, Luxemburg, Netherlands, Switzerland. *Staatsb.*, 1908, No. 224; *R. de dr. int. privé et de dr. pénal int.*, 2:798 and 4:695.
- 11 NETHERLANDS. Law ratifying international convention signed at Berne September 26, 1906, for prohibiting night work of women engaged in industries. *Staatsb.*, 1908, No. 225. Signatory powers: Germany, Austria, Hungary, Belgium, Denmark, Spain, France, Great Britain, Italy, Luxemburg, Netherlands, Portugal, Sweden, Switzerland.
- 16 ARGENTINE REPUBLIC—PARAGUAY. Approval by Paraguay of convention signed at Buenos Aires May 30, 1908, regulating the interchange of live stock between the two countries. *B. A. R.*, October.
- 17 ABYSSINIA—ITALY. Ratification by Italy of (1) the convention for delimitation of the frontier between Abyssinia and Italian Somaliland; (2) the convention for delimitation of the frontier between Abyssinia and Eritrea; and (3) the act additional to (1) for payment to Abyssinia of three million lire, — all signed at Adis Ababa May 16, 1908. *Ga. Ufficiale*, August 8; *B. del ministero degli affari esteri*, August; *R. di dr. int.*, 3:189. These agreements complete, on the side of Abyssinia, the delimitation of the Italian colonies Eritrea and Somaliland, — on the eastern frontier of the former and the northern of the latter — thus closing the boundary lines already established by the protocols with Great Britain concerning spheres of influence signed March 24 and April 15, 1891 (*State Papers*, 83:19), and May 5, 1894 (*State Papers*, 86:55); the supplementary agreements with the Egyptian and Sudanese governments signed December 7, 1898, June 1, 1899, April 16 and November 22, 1901; the treaty with Abyssinia signed July 10, 1900, the protocols with France signed January 24, 1900, and July 20, 1901; and the convention with Great Britain and Abyssinia signed May 15, 1902. *Trattati e convenzioni fra il regno d'Italia e gli altri stati*, vols. 15 and 16; *Trattati, convenzioni, accordi, protocolli ed altri documenti relativi all'Africa*, 3 vols., Rome, 1906. The last-mentioned convention traced the mutual frontier of Abyssinia and the Anglo-Egyptian

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Sudan as far south as the intersection of 35° E. with 6° N. No arrangement was then arrived at respecting the southern frontier of Abyssinia, on which side the British East Africa and Uganda Protectorates were the other parties concerned. This section was defined by an agreement signed at Adis Ababa December 6, 1907, by Abyssinia and Great Britain relative to the frontiers between British East Africa, Uganda and Abyssinia. *Geographical J.*, 21:186; *id.*, 32:621, 622; *Treaty ser.*, 1908, No. 27. See May 16, 1908.

- 20 NETHERLANDS—VENEZUELA. Venezuela hands passports to Netherlands minister. *Ga. oficial*, July 21; *Documentos del General Cipriano Castro*, 6. See September 3, 1908.
- 22 INTERNATIONAL. Protocol signed at Brussels providing for suspension for four years from February 15, 1909, of importation and sale of munitions of war in certain regions of Africa. Contracting parties: France, Germany, Spain, Great Britain, Kongo, Portugal. Confirmed by all. *J. O.*, October 15; *Treaty ser.*, 1908, No. 29. An application of Articles 1, 3, 8 and 9 of the General Act signed at Brussels July 2, 1890 (*State Papers*, 82:55; *N. R. G.*, 17:345; *Compilation of treaties in force*, 1904, 861). See April 28, 1908.
- 23 GREAT BRITAIN—LIBERIA. Agreement signed at Monrovia modifying treaty of commerce signed at London November 21, 1848. *Treaty ser.*, 1908, No. 26; *State Papers*, 36:394.
- 23 PRUSSIA—NETHERLANDS. Treaty signed at Berlin concerning railroad between Neuenhaus and Coevorden. *Preussische Gesetz-sammlung*, 1908, No. 38.
- 29 ELEVENTH INTERNATIONAL CONGRESS AGAINST ALCOHOLISM at Stockholm. Adjourned August 3. It was determined to establish an international bureau at Lausanne. Next congress at London July 18, 1909. *B. del min. de rel. ext.* (Buenos Aires), 20:630. The earlier congresses have been held at (1) Antwerp, 1885; (2) Zurich, 1887; (3) Christiania, 1890; (4) The Hague, 1893; (5) Basle, 1895; (6) Brussels, 1897; (7) Paris, 1899; (8) Vienna, 1901; (9) Bremen, 1903; (10) Budapest, 1905.

August, 1908.

- 6 FIFTH PAN-AMERICAN MEDICAL CONGRESS opened at Guatemala. Next congress at Lima. *Mém. dipl.*, September 20.

August, 1908.

- 8 PANAMA—UNITED STATES. Final report of commissioners appointed in accordance with treaty signed at Washington, November 18, 1903 (*For. rel.*, 1904). Claims. *Diario oficial*, September 12; *B. A. R.*, December.
- 10 UNITED STATES—URUGUAY. Naturalization treaty signed at Montevideo. Ratification advised by the United States Senate, December 10.
- 12 JAPAN. Korean patent ordinance, Korean design ordinance, Korean trademark ordinance, Korean trade name ordinance, and Korean copyright ordinance promulgated. Also an ordinance relating to the protection of rights of patents, designs, trademarks, and of copyrights in the province of Kwantung and in other countries where Japan exercises extraterritorial jurisdiction. These ordinances took effect August 16, 1908.
- 19 COLOMBIA—GREAT BRITAIN. Colombian decree ratifying treaty signed at Bogotá December 22, 1906, relative to industrial property. Ratified by Great Britain February 29, 1908. *B. del ministerio de rel. ext.*, 2:288.
- 19 COLOMBIA—SWITZERLAND. Colombian law, No. 15, approving treaty signed at Paris March 14, 1908. Friendship and commerce. *B. del min. de rel. ext.*, 2:12, 25.
- 19 COLOMBIA. Law ratifying convention signed at Mexico January 29, 1902, at the second Pan-American conference. *B. del min. de rel. ext.*, 2:144, 152. Rights of aliens.
- 21 COLOMBIA. Law ratifying sanitary convention signed at Washington October 14, 1905, by delegates of Chile, Costa Rica, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru, United States, Cuba, Venezuela. Colombia and Brazil were not represented at the Washington conference, but signed it at the third Pan-American sanitary conference held at Mexico, December, 1907. *B. del min. de rel. ext.*, 2:16, 27. See December 2, 1907, January 9, 1908, and May 29, 1906.
- 26 INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY. Twelfth Congress at Stockholm. Adjourned August 30. *Propriété industrielle*, September 30, 1908; *Dr. d'auteur*, 21:154. See September 14, 1906.
- 28 COLOMBIA. Law No. 23 ratifying treaty signed at Mexico January 30, 1902, respecting arbitration of pecuniary claims. Signatory

August, 1908.

- powers: Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, United States and Uruguay. *For. rel.*, 1905; *Documents, ante*, 1:303; *B. del min. de rel. ext.*, 2:146, 155.
- 28 COLOMBIA. Law No. 24 ratifying convention signed at Mexico January 27, 1902, respecting exchange of official publications. Signatory powers: Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Salvador, United States, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, Uruguay. *B. del min. de rel. ext.*, 2:148, 159.
- 29 COLOMBIA. Law No. 27 ratifying convention signed at Rio de Janeiro August 13, 1906, respecting pecuniary claims. *B. del min. de rel. ext.*, 2:150, 164.
- 29 COLOMBIA. Law No. 28 ratifying convention signed at Rio de Janeiro August 13, 1906. Condition of naturalized citizens who renew residence in country of origin. *B. del min. de rel. ext.*, 2:151, 166.

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- 1 GREECE—NORWAY. Direct money order exchange organized on the basis of the arrangement signed at Rome. *L'Union postale*, 33:176.
- 2 NETHERLANDS. Circular note to all governments represented at the second Hague conference, proposing, at the instance of the German and Italian governments, an international conference to meet at The Hague for the purpose of promoting uniform legislation concerning letters of exchange. *U. S.: H. R. Doc.*, 1243, 60 Congress.
- 2 GUATEMALA. Decree setting September 15 for inauguration of the Central American Bureau provided for in the convention signed at Washington, December 20, 1907. *El Guatemalteco*, September 8.
- 3 NETHERLANDS—VENEZUELA. Note of Netherlands to Venezuela. Netherlands states she will consider herself exonerated of the obligations of the protocol signed at The Hague, August 20, 1894 (*State Papers*, 86:543), if, after November 1, 1908, the Venezuelan decree of May 14, 1908, *q. v.*, and the measures connected with

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it still operate against the Dutch colonies. *El constitucional* (Caracas), November 16; *Documentos relativos á la cuestion venezolano-holandesa, edicion oficial, 1908*, Caracas. The grievances of Venezuela are stated to be (1) the letter dated Caracas, April 9, 1908, from the Dutch minister to an Amsterdam commercial association, and published in Amsterdam in May; (2) disturbances committed by the populace of Curaçao against the house where the Venezuelan consulate was established and against the persons of its inmates; (3) omission of a salute by the Dutch warship Gelderland. The grievances of the Netherlands against Venezuela are: (1) embargo of ships; (2) measures against the commerce and navigation of Curaçao; (3) suppression of the exequaturs of Dutch consular functionaries. *De Haseth Cz: Le différend entre la Holland et le Venezuela, Q. dipl.*, 26:407; *Ga. oficial* (Caracas), July 30; *Documentos del General Cipriano Castro*, 6:247.

- 8 FIRST INTERNATIONAL CONGRESS FOR REPRESSION OF ADULTERATION OF ALIMENTARY AND PHARMACEUTICAL PRODUCTS, at Geneva. *Science*, 27:475.
- 8 INTERNATIONAL CONGRESS FOR ABOLITION OF TRADE IN WHITE WOMEN convened at Geneva.
- 8 SIXTEENTH INTERNATIONAL CONGRESS OF AMERICANISTS met at Vienna. Adjourned September 14. *Geographical J.*, 32:376. Object: To promote scientific inquiries into the history of both Americas and their inhabitants.
- 14 FRANCE—ITALY. Ratifications exchanged at Rome of convention signed at Rome, July 18, 1907, supplementing the provisions of the convention signed July 16, 1899, relative to telephone service, and creating a service of notices of telephone calls. French decree promulgating, October 11. *J. O.*, October 14; July 18.
- 15 Inauguration at Guatemala of International Central American Bureau. *B. A. R.*, October; *El Guatemalteco*, September 8.
- 15 INTERNATIONAL CONGRESS OF ASTRONOMERS opens at Vienna. *Mém. dipl.*
- 15 BRAZIL—NETHERLANDS. Ratifications exchanged at The Hague of treaty signed at Rio de Janeiro May 5, 1906. *Diario oficial*, September 26. Boundary of Surinam. *Lagemans*: 16:82; *Staatsb.*, 1908, No. 220. The frontier follows the watershed of the

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Tumucumaque mountains from headwaters of Maroni river to those of Corentyne, near which the line meets the frontiers of French and British Guiana.

- 15 **THIRD INTERNATIONAL CONGRESS FOR THE HISTORY OF RELIGIONS** at Oxford. *Times*, September 15, 21; *Nation*, October 1; *The Oxford congress*, *Spectator*, September 26.
- 17 **INTERPARLIAMENTARY UNION** met at Berlin. Fifteenth congress. Next congress at Quebec. *Times*, September 17, 21.
- 17 **FRANCE.** Decree. Administrative regulations of criminal jurisdiction in Siam in respect to French protégés of Asiatic origin. *J. O.*, September 20; *R. de dr. int. privé et de dr. pénal int.*, 4:851; *Regelsperger: Le nouveau traité franco-siamois*; *R. gen. de dr. int. public*, 25:24.
- 22 **MOROCCO.** German reply to the Franco-Spanish circular note of September 11 to the powers signatory to the Act of Algeciras, as to recognition of Mulai Hafid. The reply begins by recording the agreement of the German government in the principle that only interests common to all the powers ought to be taken into account in determining the conditions on which Mulai Hafid should be recognized. Subject thereto, Germany does not object to the suggestion that certain guarantees required by those interests should be demanded of Mulai Hafid. It is her view, however, that the demand should be made by the doyen of the whole diplomatic corps at Tangier. With regard to the guarantees to be demanded, Germany has no objection to offer to the demand that Mulai Hafid must recognize the Algeciras Act as well as the measures taken to give effect to its application, with the reservation that such measures be legal under Moroccan State law. *Doc. dipl., Affaires du Maroc, IV, 1907-1908.* The Franco-Spanish note to Mulai Hafid was handed to Morocco at Tangier, November 19. By definitively accepting this note, approved by the powers signatory to the Act of Algeciras, and fixing the conditions on which these powers consent to recognize him, Mulai Hafid confirms the Act of Algeciras, confirms the other treaties and engagements of the magzhen, confirms the powers of the Casa-blanca indemnity commission, undertakes to pay its judgments, and disavows a holy war. Moreover, France and Spain preserve the right to make direct demand for settlement of their special

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interests, notably reimbursement of military expenses and indemnity for murders of their nationals.

- 22 INTERNATIONAL LAW ASSOCIATION. Twenty-fifth congress at Budapest. *See August 29, 1907.* The most important result of the congress is an elaborate international scheme, consisting of twenty-seven rules, to govern the law relating to bills of exchange.
- 22 FOURTH INTERNATIONAL FISHERIES CONGRESS opened at Washington. Previous congresses were held in Paris, 1900; St. Petersburg, 1902, and Vienna, 1905. *B. A. R.*, June.
- 22 TWELFTH INTERNATIONAL PRESS CONGRESS opened at Berlin. *Mém. dipl.*, September 27; *Diplomacy and the press, Spectator*, September 26. *See September 22, 1907.*
- 22 INTERNATIONAL. Ratifications deposited at Berne of the convention signed at Berne September 19, 1906, by Austria, Hungary, Belgium, Germany, France, Denmark, Italy, Luxemburg, Netherlands, Roumania, Russia, and Switzerland. The second convention additional to the international convention signed at Berne October 14, 1890 (*N. R. G.*, 19:289; *State Papers*, 82:771, 796), on railroad transportation of freight. French decree promulgating, October 17, 1908. *J. O.*, October 24; *Reichs-G.*, 1908, No. 53.
- 23 NETHERLANDS—PERU. Ratifications exchanged at Lima of consular convention signed at Lima September 25, 1907, *q. v. Staatsb.*, 1908, No. 303. Dutch decree proclaiming, September 28, 1908. *See January 16, 1908.*
- 23 BULGARIA—TURKEY. Turkish note presented to Bulgaria respecting occupation of the Oriental Railways in Bulgaria by Bulgarian troops. Observes that the occupation is an infringement of the rights of property of Turkey in the railway and that these rights are guaranteed by the treaty of Berlin. Requests Bulgarian government to give necessary orders for evacuation of the line and delivery to the company. The Bulgarian government replied September 24, stating that the transfer of the line and its working by them were a consequence of the strike and had taken place with concurrence of the company, and that restoration to the company is a question that will be arranged between Bulgaria and the company. The protest of the company, dated October 10, appears in *J. des débats*, October 18.

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- 25 PERSIA. Rescript fixing date of the convention of the Mejliss and the Senate for November 14. Tabriz is excluded from its provisions until order and security are re-established there. *Times*, October 3. *See November 19, 1908.*
- 25 FIRST INTERNATIONAL CONGRESS ON MORAL EDUCATION opened at London. *Times*, September 25.
- 26 ECUADOR—PANAMA. Sanitary convention signed at Quito. *B. A. R.*, December.
- 26 Unveiling of a statue raised to commemorate the tercentenary of Alberico Gentili at San Ginesio, his birthplace. Author of *De jure belli* and *De Legationibus*. *Times*, September 27; *Agabiti: Alberico Gentili, fondatore della scienza del diritto internazionale*, Fermo, 1908, 85 pp.
- 26 GREAT BRITAIN. Order in council revoking the Brunei orders in council, 1901 and 1906 (*Hertslet*, 23:285), which provided for the exercise of British power and jurisdiction in Brunei. The British government and the Sultan of Brunei entered into an agreement December 3, 1905, providing for the reception by the Sultan of a British officer to be styled the Resident, as the Agent and Representative of the British Crown. By The Courts Enactment, 1908, the Sultan has made legislative provision for the constitution and powers of the Resident's court and other civil and criminal courts subordinate thereto. Brunei was placed under British protection in 1888. *London Ga.*, October 6, 1908.
- 28 SIXTH INTERNATIONAL TUBERCULOSIS CONGRESS opens in Washington. Next congress at Rome in 1911.
- 28 THIRTIETH CONGRESS OF THE INTERNATIONAL LITERARY AND ARTISTIC ASSOCIATION, at Mayence. For proceedings, see *Dr. d'auteur* 21:131. *See August 26, 1907.*
- 28 BRAZIL. Decree No. 1963, approving convention signed at Rome June 7, 1905, creating an International Institute of Agriculture with seat in Rome. *See January 29, May 30, and November 27, 1908.*
- 28 INSTITUT DE DROIT INTERNATIONAL. Twenty-fourth session convened at Florence. *R. di dr. int.*, 3:132. Next meeting at Paris in 1910. *De Labra: El instituto de derecho internacional*, Madrid, 1907; *Times*, October 8, contains summary of proceedings. *See September 19, 1906*

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- 30 BELGIUM signed two Hague conventions of July 17, 1905, respecting (1) civil procedure and (2) marriage. The former was signed by Norway July 5, 1907, by Denmark July 13, 1907. *See July 15, 1907. La codification du droit international privé, Bulletin des conférences de la Haye, La Haye.*

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- 1 SECOND INTERNATIONAL CONGRESS OF POPULAR EDUCATION met at Paris. The first congress was held at Milan, September, 1907.
- 1 GREAT BRITAIN—UNITED STATES. Inauguration of penny postage by special agreement. Colonies and island possessions not included. *Heaton: The fight for universal penny postage, Nineteenth century*, 64:588.
- 1 JAPAN—SIAM. Direct money order exchange organized on basis of Rome arrangement. *L'union postale*, 33:176.
- 1 ARGENTINE REPUBLIC—BRAZIL. Brazilian decree No. 1971, approving arbitration treaty signed at Rio de Janeiro September 7, 1905. *Diario official*, October 3, 1908; *For. rel.*, 1905, p. 103; *B. A. R.*, December, 1908; *Documents*, *post.*
- 3 AUSTRIA-HUNGARY. Circular note to European powers announcing decision to occupy Bosnia and Herzegovina definitively. *Text, Journal des débats*, October 9; *Q. dipl.*, 26:508; *R. gén. de dr. int. public*, 15:35 (documents).
- 5 FIRST INTERNATIONAL CONGRESS ON REFRIGERATING INDUSTRIES at Paris. *Boole: Science in refrigeration, Bulletin No. 70 of the American Chamber of Commerce in Paris; Times*, October 14, 21; *Payen: Le congrès international du froid, Q. dipl.*, 26:574. Next congress at Vienna in 1910.
- 5 BULGARIA. Prince Ferdinand proclaimed independence of Bulgaria and assumed title of King. Ferdinand, youngest son of the late Prince Augustus of Saxe-Coburg and Gotha and the late Princess Clementine of Bourbon-Orleans (daughter of King Louis Philippe), was born February 26, 1861; was elected Prince of Bulgaria by unanimous vote of the National Assembly July 7, 1887; assumed the government August 14, 1887, in succession to Prince Alexander, who had abdicated September 7, 1886. His election was confirmed by the Porte and the Great Powers in March, 1896. Married (1) April 20, 1893, to Marie Louise (died January 31,

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1899), eldest daughter of Duke Robert of Parma; (2) February 28, 1908, to Princess Eleonore of Reuss Köstritz. For text of Ferdinand's manifesto at Tirnovo proclaiming independence, *Mém. dipl.*, October 11. By the treaty signed at Berlin, July 13, 1878, Bulgaria was constituted an "autonomous and tributary principality under the suzerainty" of Turkey. The treaty provided that the prince of Bulgaria should be freely elected by the population and confirmed by Turkey, with the consent of the powers; that Bulgaria should pay annual tribute to Turkey and should bear a portion of the Turkish public debt. The same treaty provided that Eastern Rumelia should remain subject to the direct political and military authority of Turkey, while retaining administrative autonomy. The position of Eastern Rumelia was altered by an agreement signed at Constantinople April 5, 1886, by Great Britain, France, Russia, Germany, Austria-Hungary, Italy, and Turkey, whereby it was provided that the office of governor-general of the province created by Article XVII of the Berlin treaty should be vested in the Prince of Bulgaria. Bulgaria has never paid the tribute due to Turkey under Article IX of the Berlin treaty, nor borne any share of the Ottoman debt. Eastern Rumelia has paid some tribute and some share of interest on the debt under Clause III of the Constantinople agreement, but not regularly. *The ambitions of Bulgaria*, *Spectator*, September 26; *Hanotaux: Le congrès de Berlin*, *R. des deux mondes*, 47:241; *The Balance of Power in the Balkan peninsula*, *Times*, September 9, 14, 16, 21, 26, 29; *Sarivianoff: La Bulgarie est-elle . . . un état mi-souverain?* Paris, 1907; *Stead: Ferdinand I, Czar of the Bulgars*, *R. of R.*, 38:554; *Omer Lutfi: Die volkerrechtliche Stellung Bulgariens und Ostrumeliens*, Erlangen, 1903; *Serkis: La Roumélie Orientale et la Bulgarie actuelle*, Paris, 1898; *Karamichaloff: La Principauté de Bulgarie au point de vue du droit international*, Lausanne, 1897; *Balaktchieff: Die Rechtliche Stellung des Fürstentums Bulgarien*, Würzburg, 1893; *Massy: The Bulgarian point of view*, *Nineteenth Century*, 64:719; *Calchas: The problem of the near East*, *Fortnightly R.*, 84:735; *Henry: Des monts de Bohême au Golfe Persique*, Plon, 1908; *Svetozar Tonjoroff: Bulgaria and the treaty of Berlin*, *North American R.*, 188:833; *Sofia: The lesser tsar*, *National R.*, 52:583; *Gauvain:*

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La crise orientale, Q. dipl., 26:461; *Scelle: Le situation diplomatique de la Bulgarie avant la proclamation de son indépendance le 5 octobre 1908, R. gén. de dr. int. public*, 15:524.

- 6 TURKEY. Circular note to the powers signatory to the treaty of Berlin respecting the Bulgarian proclamation of independence. The note concludes:

The Imperial Government could resort to force to secure the protection of its rights, but being, above all, respectful to treaties, and anxious for the general interests involved in the general need for European peace, it desires to avoid such an extremity, and appeals to the Great Powers. It awaits with calm their decision. Nevertheless, it protests against the infraction of the treaty, and reserves the rights conferred by that instrument and the international convention to which it is a corollary. Text, *Journal des débats*, October 9; *Times*, October 9.

- 7 AUSTRIA-HUNGARY. Emperor issued a proclamation to the people of Bosnia and Herzegovina annexing those provinces. This was published in the *Wiener Zeitung* on this date, also the letter dated October 3 of the Emperor to the states signatory to the treaty of Berlin, an imperial rescript to Baron Aehrenthal, an imperial rescript to the president of the Austrian council, and an imperial rescript to the president of the Hungarian council. *Mém. dipl.*, October 11; *Blennerhassett: Austria and the Berlin treaty, Fortnightly R.*, 84:751; *Diplomaticus: The secret treaty of Reichstadt, id.*, 84:828; *Blocq: La réplique Austro-Allemande, Nouvelle R.*, 6:124; *François-Joseph, roi des serbes, Nouvelle R.*, 6:241; *Britannicus: Austria-Hungary and the near East, North American R.*, 188:823; *Sellers: The power behind the Austrian throne, Fortnightly R.*, 84:925; *Viator: The truth about Bosnia and Herzegovina, Fortnightly R.*, 84:1007; *Ivanovitch: Europe and the annexation of Bosnia and Herzegovina, Fortnightly R.*, 85:1; *R. gén. de dr. int. public*, 15:33 (documents); *Holland: The European concert in the Eastern question*, Oxford, 1885, is a collection of treaties and other public acts; *Younghusband: Near Eastern questionings, National R.*, 52:725; *Reich: The Austro-Hungarian case, Nineteenth century*, 64:705; *Yokanovitch: An English bibliography [1480-1906] on the near Eastern question*, Belgrade (the forty-eighth part of the *Spomeniks*). An epitome

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of the negotiations between Austria-Hungary and Russia on the program of the proposed Balkan conference is contained in a *communiqué* issued at Vienna December 28 and printed in *Times* December 29.

- 7 **SERVIA.** Proclamation protesting to the powers against the annexation of Bosnia and Herzegovina. *Times*, October 9; *Mém. dipl.*, October 11. A royal ukase convoked the Skupshtina in extraordinary session for October 10. For proceedings, *Mém. dipl.*, October 18.
- 7 **MONTENEGRO.** Proclamation declaring that Article XXIX of the treaty of Berlin could no longer be binding on Montenegro. *Mém. dipl.*, October 11. The restrictions imposed upon Montenegro by this article were mainly provisions in favor of Austrian control of the entrances and exits of Montenegro.
- 8 **CHINA—UNITED STATES.** Treaty of general arbitration signed at Washington. Ratification advised by the Senate, December 10.
- 8 **CHINA.** Peking-Hankow Railway redemption contract signed at Peking. The contract provides for a loan of £5,000,000. Of the proceeds 80% will be applied to the redemption of the Peking-Hankow Railway and the balance applied in China to productive works under the control of the Ministry of Communications. *Times*, October 9, 28.
- 9 **DENMARK—NORWAY.** Treaty of arbitration signed at Copenhagen. *Mém. dipl.*
- 12 **INTERNATIONAL CONFERENCE ON ELECTRICAL UNITS AND STANDARDS** met at London. The main object of the conference is to obtain international agreement on the three electrical units — the ohm, the ampère, and the volt. *Times*, October 7, 14, 21, 28.
- 12 **CRETE.** The chamber, convoked in extraordinary session, is opened by the president of the government in the name of the King of Greece, and union with Greece is formally voted. October 13 the Cretan chamber elected a committee entrusted with the task of governing the island in the name of the King of Greece and according to Greek laws, to be put in force by decrees, the power of the committee to end when Greece assumes administration.
- 12 **FIRST INTERNATIONAL ROAD CONGRESS** meets at Paris. *Times*, October 6, 13, 27. Next congress at Brussels in 1910.

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- 12 SOUTH AFRICA. Conference on Closer Union opened at Durban to devise a practical scheme for federation of Cape Colony, Natal, Transvaal, Rhodesia, and Orange River Colony. *Times*, October 6.
- 13 SWITZERLAND—UNITED STATES. Ratification by Switzerland of arbitration convention signed at Washington, February 29, 1908; ratification advised by the U. S. Senate, March 6, 1908; ratified by the President, May 29, 1908; ratifications exchanged at Washington, December 23, 1908; proclaimed, December 23, 1908. *U. S. Treaty ser.*, No. 515.
- 14 FRANCE—GREAT BRITAIN. Exchange of notes at London renewing for a further term of five years the arbitration agreement signed at London October 14, 1903. *Treaty ser.*, 1903, No. 18; *id.*, 1908, No. 34.
- 14 CHINA—GREAT BRITAIN. Ratifications exchanged at Peking of Tibetan trade regulations signed at Calcutta April 20, 1908. *Times*, October 15. *See April 20, 1908.*
- 14 SECOND INTERNATIONAL CONFERENCE for revision of the Berne copyright convention opened at Berlin. The objects were to examine the agreements which form the basis of the international union for protection of copyright property and to agree upon amendments rendering them more effective. The first conference took place at Paris in 1896. *See November 13, 1908. Delzons: La propriété artistique et littéraire à la conférence de Berlin, R. des deux mondes*, 47:669; Raqueni: *Le congrès littéraire de Berlin, La nouvelle R.*, 5:525.
- 16 LIBERIA. Accession to the international copyright convention signed at Berne September 9, 1886, and the additional act and declaration signed at Paris May 4, 1896. *Treaty ser.*, 1908, No. 30; *Dr. d'auteur*, 21:145.
- 18 BELGIUM—KONGO. Belgian law approving treaty of cession of Kongo to Belgium signed at Brussels November 28, 1907. *Mém. dipl.*, October 25; *Arch. dipl.*, 107:291; Daniels: *The Congo question and the Belgian solution, North American R.*, 188:890; *Cd.*, 4396. *See November 28, 1907, and November 4, 1908.* A law of this date also approves the additional act signed March 5, 1908. *Arch. dipl.*, 107:293.

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- 19 CHINA. Imperial edict stating that the government has abandoned its monopoly of the opium-selling business, and that a licensing system will be substituted. *Times*, October 20; *Cd.*, 4316; *The opium question*, *North China Herald*, 89:433; *China: The abolition of opium*, *Times*, April 4, 1908. See March 22 and April 17, 1908.
- 19 First meeting of the council of the INTERNATIONAL ELECTRO-TECHNICAL COMMISSION at London. *Times*, October 8, 20, 28. A preliminary meeting of the international electro-technical commission was held in London in June, 1906. This commission was formed for the purpose of carrying out the resolution of the Chamber of Government Deputies at the International Electric Congress held at St. Louis in September, 1904. The resolution passed at the congress recommended that steps should be taken to secure cooperation of the technical societies of the world by the appointment of a representative commission to consider the question of the standardization of the nomenclature and ratings of electrical apparatus and machinery.
- 27 GERMANY—GREAT BRITAIN. Agreement and protocol signed at London with regard to sleeping sickness. *Treaty ser.*, 1908, No. 28. Takes effect January 1, 1909, for three years and automatically for further periods of one year until denounced by one of the parties six months before the expiration of that year. Cooperation in combating the disease will take the form chiefly of exchanging reports of cases and in arranging for destruction when virus is transmitted by flies or mosquitoes. See March 9, 1908.
- 27 BULGARIA. France, Great Britain, and Russia present at Sofia an identical note expressing hope that Bulgaria will send to Constantinople an envoy to open negotiations with the end of securing from Turkey an acknowledgment of independence and of coming to an agreement as to compensation to Turkey. The powers declare themselves ready to recognize fully at a conference such agreement. *Mém. dipl.*, November 1; *Times*, October 28. The German and Italian diplomatic representatives at Sofia informed Bulgaria, October 29, that their governments approve. Bulgaria replied, October 29, acceding to the recommendations.
- 29 NETHERLANDS—PORTUGAL. Ratifications exchanged at The Hague of treaty signed at The Hague October 1, 1904, fixing boundary

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of their possessions on the island of Timor. *Nederlandische Staatscourant*, No. 257.

- 29 NETHERLANDS—PORTUGAL. Ratifications exchanged at The Hague of treaty signed at The Hague October 1, 1904. *Nederlandische Staatscourant*, No. 257; *Staatsb.*, 1906, No. 18. Arbitration.
- 30 CHINA—FRANCE. Chinese imperial decree respecting fracas between Chinese and French soldiers in Tonkin in June, 1908, which resulted in the loss of several French lives. Punishment of Chinese officers, *North China Herald*, November 7. China pays \$100,000 indemnity, together with the assessed damage to the Yunnan railway. She will also renew the mining rights and allow an extension of the railway to Sianfu.

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- 1 ABYSSINIA. Adhesion to universal postal union takes effect.
- 2 INDIA. Imperial message to the princes and peoples of India granting amnesty to prisoners and greater political rights to the native population, read by the viceroy in durbar at Jodhpur. Text of this message and of Queen Victoria's proclamation of November 1, 1858, transferring the government of India from the East India Company to the Crown, in *Times*, November 2, 1908. *North American R.*, 188:938; *Hubbard: The English in India, Atlantic Monthly*, 101:835; *Keene: The conflict of civilizations in India, Nineteenth Century*, 63:1022; *Parliamentary government and our Indian empire, Spectator*, July 4; *Times*, April 11; *Marchand: Le problème indien et les troubles de la frontière indo-afghane, Q. dipl.*, 25:757; *The unrest in India, Quarterly R.*, 209:216; *Mitra: Indian problems*, London, 1908; *Sunderland: The new nationalist movement in India, Atlantic Monthly*, 102:526; *Nisbet: India under crown government, 1858-1908, Nineteenth Century*, 64:786; *Cox: Danger in India, Nineteenth Century*, 64:941; *Tupper: Indian sedition, National R.*, 52:572; *Rees: India in parliament in 1908, Fortnightly R.*, 84:937; *Leygues: Le problème asiatique, Nouvelle R.*, 6:289; *Times*, October 31, November 2; *Cd.*, 3912, 4426, 4435, 4436; *Spectator*, December 26. See September 7, 1907.
- 3 BELGIUM. Royal decree, under authority of articles 29 and 66 of the constitution, organizing the new ministry of colonies and pre-

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scribing rules and regulations therefor. *Monit.*, November 4; *Arch. dipl.*, 107:338.

- 4 **BELGIUM—KONGO.** Belgian decree naming November 15, 1908, the date on which Belgium will extend her sovereignty over Kongo. Under article 4 of treaty of cession signed November 28, 1907. *Monit.*, November 5; *B. officiel de l'Etat independant du Congo*, October, 1908; *Times*, December 23; *Arch. dipl.*, 107:349. See *October 18 and November 3, 1908.*
- 4 **INTERNATIONAL.** Monetary convention signed, additional to the convention signed at Paris, November 6, 1885. The first clause provides that from the date of promulgation of the convention the amount of silver coin allowed for each country of the union shall be raised to 16f. per inhabitant. The Belgian, French, Swiss and Italian governments undertake to withdraw from circulation in their respective territories the Greek silver pieces of 2f., 1f., 50c., and 20c., and to restore them to the Greek government, which will reimburse them with gold. Greece will withdraw all one and two drachma notes, issuing silver instead. *Times*, December 18. The convention was laid before the Greek chamber December 17.
- 4 **HONDURAS—NICARAGUA.** Treaty of commerce signed at Tegucigalpa. To take effect the date of exchange of ratifications, and to endure thereafter for ten years and for one year after either contracting party notifies the other of its intention to terminate it.
- 12 **BRAZIL.** Decree No. 7,172, proclaiming agreement signed at Rome December 9, 1907, for foundation at Paris of an international office of public hygiene. Brazil's ratification was deposited at Rome October 28, 1908. Takes effect November 15, 1908. *Diario official*, November 12.
- 12 **AUSTRIA—UNITED STATES.** Parcel-post convention signed at Washington; signed at Vienna October 9, 1908; ratified by the President November 12, 1908. Takes effect January 1, 1909. *Stat. at L.*, vol. 35.
- 12 **CHINA—JAPAN.** Final agreement signed at Peking respecting the Kirin-Kwanchengtze branch of the Japanese South Manchurian Railway. *Times*, November 12. For the preliminary agreement signed at Peking April 15, 1907, see *J. of American Asiatic Assn.*, July, 1907; *North China Herald*, 85:643, and *Official ga.*, Tokyo, May 4, 1907. See *April 15, 1907.*

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- 13 BULGARIA—GREAT BRITAIN. Procès-verbal signed at Sofia respecting customs duties, supplementary to commercial convention signed at Sofia December 9, 1905. *Treaty ser.*, 1908, Nos. 1 and 32.

- 13 INTERNATIONAL. Convention signed at Berlin for protection of literary and artistic property.

ART. 25. The States outside of the union which assure legal protection of the rights which are the object of the present convention may accede to it upon their request.

This accession shall be made known in writing to the Government of the Swiss Confederation and by the latter to all the others.

Such accession shall imply full adhesion to all the clauses and admission to all the advantages stipulated in the present convention. It may, however, indicate such provisions of the convention of September 9, 1886, or of the additional act of May 4, 1896, as it may be judged necessary to substitute provisionally, at least, for the corresponding provisions of the present convention.

ART. 26. The contracting countries have the right to accede at any time to the present convention for their colonies or foreign possessions.

They may, for that purpose, either make a general declaration by which all their colonies or possessions are included in the accession, or name expressly those which are included therein, or confine themselves to indicating those which are excluded from it.

This declaration shall be made known in writing to the Government of the Swiss Confederation, and by the latter to all the others.

ART. 27. The present convention shall replace, in the relations between the contracting States, the convention of Berne of September 9, 1886, including the additional article and the final protocol of the same day, as well as the additional act and the interpretative declaration of May 4, 1896. The conventional acts above mentioned shall remain in force in the relations with the States which do not ratify the present convention.

The States signatory to the present convention may, at the time of the exchange of ratifications, declare that they intend, upon such or such point, still to remain bound by the provisions of the conventions to which they have previously subscribed.

ART. 28. The present convention shall be ratified, and the ratifications shall be exchanged at Berlin, not later than the 1st of July, 1910. • • •

Signed by Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, Japan, Liberia, Luxemburg, Monaco, Norway, Sweden, Switzerland, Tunis. Text in *Dr. d'auteur*, 21:141, and *J. des débats*, November 19; *Dr. d'auteur*, 21:146. Conformably

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to usage, the German government had invited to the conference the powers that do not belong to the Union. Delegates were sent by Argentine Republic, Chili, China, Colombia, Ecuador, United States, Greece, Guatemala, Mexico, Nicaragua, Netherlands, Peru, Persia, Portugal, Roumania, Russia, Siam, Uruguay, Venezuela. *Mém. dipl.*, November 22. See *September 16, 1908. Delzons: L'œuvre de la conférence de Berlin sur la propriété littéraire et artistique, R. des deux mondes*, 48:895; U. S. H. R. Doc., 1208, 60 Congress; for statement of international copyright relations of the United States, see Circulars Nos. 38 and 39 of the Copyright office, Library of Congress.

- 13 CHINA. Decree of the emperor in compliance with the command of the empress dowager appointing Prince Ch'un regent and ordering that Pu Yi (son of Prince Ch'un) be brought to the palace where he will be educated. *North China Herald*, November 21. Prince Ch'un is the third son of the late Prince Ch'un who had five sons. The eldest is dead; the second was Emperor Kuang Hsü. Prince Ch'un succeeded to his father's title in January, 1891. Prince Pu Yi was born February 11, 1906. See *November 14*.
- 14 FRANCE—GERMANY. Exchange of notes at Berlin declaring accession of German protectorates to the international copyright convention signed September 9, 1886, to apply also to the Franco-German copyright convention signed at Paris April 8, 1907. *Reichs-G.*, 1908, No. 57. The accession of the German protectorates takes effect January 1, 1909. *Dr. d'auteur*, 21:157.
- 14 CUBA. General election for president for term ending May 20, 1913. By virtue of Decree No. 900 of September 12, 1908, and in accordance with Decree No. 899, reenacting in revised and corrected form the electoral law of April 1, 1908, and its amendment, Decree No. 1,054. The electoral college on December 24 (Decree No. 1121, *Ga. oficial*, December 1) chose José Miguel Gomez president. Municipal and provincial elections had been held August 1, 1908. *Ga. oficial*, September 11, October 30, November 11. *Informe de la administracion provisional, desde 13 octubre 1906 hasta el 1° de diciembre de 1907 por Charles E. Magoon, gobernador provisional*, Habana, 1908; *Conditions in Cuba*, *Nation*. 86:346.

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- 14 CHINA. (1) Valedictory manifesto of Emperor Kuang Hsü. (2) Decree in the name of the empress dowager announcing death of Kuang-Hsü. (3) Decree in name of the empress dowager commanding that Pu Yi be adopted as the son of Kuang Hsü, and to enter upon the inheritance of the dynastic line as emperor by succession. (4) Decree in the name of the empress dowager stating that the Prince Regent shall govern until the emperor fulfils the period of his education. (5) Inaugural decree of the emperor in compliance with the command of the empress dowager stating that Kuang Hsü died this date and prescribing mourning. (6) Decree making the empress dowager, empress grand dowager and the empress (widow of Kuang Hsü) empress dowager. *North China Herald*, November 21. Tsai-t'ien, born August 2, 1872, son of Yi-huan Prince Ch'un, who was seventh son of the Emperor Tao-kuang and brother of the Emperor Hsien-fêng, succeeded to throne under title of Kuang-Hsü, 1875. *Vay de Vaya and Luskod: Empires and emperors of Russia, China, Korea, and Japan*, New York, 1906.
- 14 PORTUGAL—UNITED STATES. Ratifications exchanged at Washington of treaty of naturalization signed at Washington May 7, 1908. Ratification advised by the Senate, May 14, 1908; ratified by Portugal, September 21, 1908; ratified by the President, November 6, 1908; proclaimed by the President, December 14, 1908. *U. S. Treaty ser.*, No. 513; *Stat. at L.*, vol. 35; *Diario do Governo*, December 14.
- 14 PORTUGAL—UNITED STATES. Ratifications exchanged at Washington of treaty of general arbitration signed at Washington April 6, 1908. Ratification advised by the Senate, April 17, 1908; ratified by Portugal, September 21, 1908; ratified by the President, November 6, 1908; proclaimed by the President, December 14, 1908. *U. S. Treaty ser.*, No. 514; *Stat. at L.*, vol. 35. Term, five years from date of exchange of ratifications. *Diario do Governo*, December 14.
- 14 PORTUGAL—UNITED STATES. Ratifications exchanged at Washington of treaty of extradition signed at Washington May 7, 1908. Ratification advised by the Senate, May 22, 1908; ratified by Portugal, September 21, 1908; ratified by the President, October 26, 1908; proclaimed by the President, December 14, 1908. *U.*

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S. Treaty ser., No. 512. No person charged with crime shall be extraditable from Portugal upon whom the death penalty can be inflicted for the offense charged by the laws of the jurisdiction in which the charge is pending. *Stat. at L.*, vol. 35; *Diario do Governo*, December 14.

- 15 CHINA. (1) Valedictory manifesto of the empress grand dowager. (2) Imperial edict announcing death of empress grand dowager this date. *North China Herald*, November 21; *Payen: La mort des souverains chinois, Q. dipl.*, 26:669. Tzu-hsi, born November 17, 1834, was mother of the Emperor T'ung-chih, the predecessor of Kuang-hsü. Tzu-hsi was maternal aunt of Kuang-hsü. *Carl: With the empress-dowager of China*, London, 1906; *id.*, New York, 1905; *id.*, *Century*, 70:803; *China and the new era, Spectator*, November 21; *Blake: The rule of the empress dowager, Nineteenth century*, 64:990; *Dillon: The late empress of China, Fortnightly R.*, 85:19; *Times*, December 29.
- 17 UNITED STATES. Proclamation of arrangement signed at Rome, December 9, 1907, for the establishment of The International Office of Public Health. Ratification advised by the Senate, February 10, 1908; ratified by the President, February 15, 1908. *U. S. Treaty series*, No. 511. *See July 5, 1908.* The main object of the office is to collect and bring to the knowledge of the participating States facts and documents of a general character concerning public health and especially regarding infectious diseases, notably cholera, plague, and yellow fever, as well as the measures taken to check these diseases. Each State is allowed a number of votes in the government of the office inversely proportioned to the number of the class to which it belongs as regards its participation in the expenses of the office.
- 19 PERSIA. Rescript issued declaring that a mejliss would not be convoked. This rescript was recalled owing to representations made to the Shah by the British and Russian legations November 22. For an account of the principal events of November at Teheran, see *Times*, December 22; *J. des debats*, November 26; *Spectator*, November 28. On December 2 the Shah sent a message to the British minister that he was resolved to keep the promise given in his decree of October 2 and convoke a mejliss suited to the needs of the country and in accordance with Mohammedan law.

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- 25 MOROCCO. Mulai Hafid proclaimed Sultan at Casablanca. *J. des debats*, November 26.
- 25 FRANCE—GERMANY. Compromis of arbitration of the Casablanca incident signed at Berlin. The members of the tribunal will be taken from the members of The Hague arbitral court, and except as to the points specified in the present compromis, the disposition of the convention of October 18, 1907, for pacific adjustment of international disputes will be applicable. The arbitral court will meet May 1, 1909, at The Hague. *J. des debats*, November 12 and 26; *Times*, November 25; *Q. dipl.*, 26:443.
- 26 BULGARIA—GREAT BRITAIN. Expiration of period for notification of accessions of British colonies to the treaty of friendship, commerce and navigation signed at Sofia December 9, 1905 (*Treaty ser.*, 1908, No. 1), under Article XX thereof. The colonies which have acceded are: Bahamas, Barbados, Basutoland, Bechuanaland Protectorate, Bermuda, British Guiana, British Honduras, Ceylon, Cyprus, East Africa Protectorate, Falkland Islands, Federated Malay States (Perak, Selangor, Negri Sembilan, Pahang), Fiji, Gambia, Gilbert and Ellice Islands Protectorate, Gold Coast, Grenada, Hong Kong, Jamaica (Turks Islands, Cayman Islands), Leeward Islands (Antigua, Montserrat, Saint Christopher-Nevis, Virgin Islands, Dominica), Malta, Mauritius, Northern Nigeria, Nyasaland Protectorate, Saint Helena, Saint Lucia, Saint Vincent, Seychelles, Sierra Leone, Solomon Islands Protectorate, Somaliland Protectorate, Southern Nigeria, Southern Rhodesia, Straits Settlements, including Labuan, Trinidad and Tobago, Uganda Protectorate, Wei-hai-Wei. *Treaty ser.*, 1908, No. 31.
- 27 INTERNATIONAL INSTITUTE OF AGRICULTURE held its first general meeting at Rome. *Times*, November 28.
- 30 FRANCE—GREAT BRITAIN. Ratifications exchanged at London of convention signed at London January 25, 1908, respecting exchange of post office money orders between France and the Transvaal. *Treaty ser.*, 1908 No. 33.
- 30 JAPAN—UNITED STATES. Notes exchanged at Washington declaring policy in the far East. *Brooks: Aspects of the American-Japanese agreement*, *Independent*, 65:1554.

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1. It is the wish of the two Governments to encourage the free and peaceful development of their commerce on the Pacific Ocean.

2. The policy of both Governments, uninfluenced by any aggressive tendencies, is directed to the maintenance of the existing status quo in the region above mentioned, and to the defense of the principle of equal opportunity for commerce and industry in China.

3. They are accordingly firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.

4. They are also determined to preserve the common interests of all powers in China by supporting by all pacific means at their disposal the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire.

5. Should any event occur threatening the status quo as above described or the principle of equal opportunity as above defined, it remains for the two Governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.

- 30 GERMANY—PORTUGAL. Treaty of commerce signed at Oporto. *J. des débats*, December 2; *Times*, December 2, 28. See August 26, 1908.

HENRY G. CROCKER.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES ¹

Consular officers, Digest of circular instructions to, January 1, 1897-May 25, 1908. Compiled by Augustus E. Ingram. 153 p. *Dept. of state.*

Extracts from the revised statutes and the statutes at large relating to the Department of State, diplomatic and consular service, and foreign relations. 1908. 150 p. *Dept. of state.*

France, Parcel-post convention between United States and. 1908. 16 p. *Post-office dept.*

Immigration laws and regulations of July 1, 1907. 5th edition. October 5, 1908. 86 p. *Bureau of immigration and naturalization.* Paper, 10c.

Japan, Convention between the United States and. Arbitration. Signed at Washington May 5, 1908; proclaimed September 1, 1908. 4 p. *Dept. of state.*

Naturalization. Convention between the United States and Salvador. Signed at San Salvador March 14, 1908; proclaimed July 23, 1908. 6 p. *Dept. of state.*

Naturalization laws and regulations, September 1, 1908. 28 p. *Bureau of immigration and naturalization.* 5c.

Netherlands, Commercial agreement between the United States and, under sec. 3, tariff act, July 24, 1897. Signed at Washington May 16, 1907; proclaimed August 12, 1908. 7 p. *Dept. of state.*

Netherlands, Reciprocity between the United States and the. August 13, 1908. 3 p. *Treasury dept.* (Dept. circular 64.)

Newfoundland fisheries. Agreement effected by exchange of notes between the United States and Great Britain. Signed at London July 15-23, 1908. 5 p. *Dept. of state.*

Santo Domingo, Report on the debt of, submitted to the President of the United States by Jacob H. Hollander, special commissioner. 1905. 250 p. (S. confidential ex. doc. 1, 59th Cong., 1st sess.)

¹ When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Sweden, Convention between the United States and. Arbitration. Signed at Washington May 2, 1908; proclaimed September 1, 1908. 5 p. *Dept. of state.*

Trade-marks, etc., in China, Treaty between the United States and Japan, protection of. Signed at Washington May 19, 1908; proclaimed August 11, 1908. 5 p. *Dept. of state.*

Trade-marks, etc., in Korea, Treaty between the United States and Japan, protection of. Signed at Washington May 19, 1908; proclaimed August 11, 1908. 5 p. *Dept. of state.*

GREAT BRITAIN ²

British and foreign state papers. 1903-1904. Vol. 97. *Foreign office.* 10s.

China treaties, Hertslet's. Treaties, etc., between Great Britain and China; and between China and foreign powers; and orders in council, rules, regulations, acts of Parliament, decrees, etc., affecting British interests in China. In force on the 1st January, 1908. Third edition. 2 vols. *Foreign office.* 35s.

Commercial travellers' samples, Agreement between the United Kingdom and Italy respecting. May 30, 1908. *Foreign office.* (cd. 4176.) ½d.

Distressed seamen, Notes exchanged between the United Kingdom and Sweden and Norway relative to the agreement of July 12, 1881, for the mutual relief of. November, 1907, to May, 1908. *Foreign office.* (cd. 4140.) ½d.

Food fishes in the waters contiguous to the United States and the Dominion of Canada, Convention between the United Kingdom and the United States of America respecting the protection, preservation, and propagation of. Signed at Washington April 11, 1908. *Foreign office.* (cd. 4138.) ½d.

House of Lords manuscripts. N. S., vol. 4, 1699-1702. *House of Lords.* (H. of C. paper, 1908, No. 249.) 2s. 9d.

International boundary between the United States and the Dominion of Canada, Treaty between the United Kingdom and the United States of America respecting the demarcation of the. Signed at Washington April 11, 1908. *Foreign office.* (cd. 4139.) 1d.

² Official publications of Great Britain, India, and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, Eng.

Manuscripts of the Marquess of Ormonde, K. P., preserved at Kilkenny Castle, Calendar of. N. S., vol. 5. *Historical manuscripts commission*. (cd. 4116.) 2s. 10d.

North Sea, Declaration and memorandum between the United Kingdom, Denmark, France, Germany, the Netherlands, and Sweden, concerning the maintenance of the *status quo* in the territories bordering upon the. Signed at Berlin April 23, 1908. *Foreign office*. (cd. 4248.) $\frac{1}{2}$ d.

Peace conference held at The Hague in 1907, Final act of the second, and conventions and declaration annexed thereto. *Foreign office*. (cd. 4175.) 1s. 3d.

Peace conference held at The Hague in 1907, Further correspondence respecting the second. *Foreign office*. (cd. 4174.) $\frac{1}{2}$ d.

United States of America, Arbitration convention between the United Kingdom and the, with an exchange of notes as to the interpretation of article 2. Signed at Washington April 4, 1908. *Foreign office*. (cd. 4179.) $\frac{1}{2}$ d.

United States of America, Treaty between the United Kingdom and the, providing for the conveyance of persons in custody for trial either in Canada or the United States through the territory of the other; and for reciprocal rights in wrecking and salvage in the waters contiguous to the boundary between Canada and the United States. Signed at Washington May 18, 1908. *Foreign office*. (cd. 4247.) $\frac{1}{2}$ d.

CANADA

Immigration. Report by W. L. Mackenzie King, C. M. G., deputy minister of labour, on mission to England to confer with the British authorities on the subject of immigration to Canada from the Orient and immigration from India in particular. 1908. 10 p. *Dept. of labour*. (No. 36a-1908.)

International waterways commission. Supplement to report of 1907. 36 p. (No. 19b-1908.)

Same. Supplementary report, 1908. 5 p. (No. 19c-1908.)

Vancouver riots. Report by W. L. Mackenzie King, C. M. G., deputy minister of labour, commissioner appointed to investigate into the losses sustained by the Chinese population of Vancouver, B. C., on the occasion of the riots in that city in September, 1907. 1908. 18 p. *Dept. of labour*. (No. 74f-1908.)

Vancouver riots. Report by W. L. Mackenzie King, C. M. G., deputy minister of labour, commissioner appointed to investigate into the losses sustained by the Japanese population of Vancouver, B. C., on the occasion of the riots in that city in September, 1907. 1908. 21 p. *Dept of labour.* (No. 74g-1908.)

ARGENTINE REPUBLIC

Conferencia internacional de la paix, La República Argentina en la segunda. Haya 1907. Buenos Aires, 1908. 207 p. *Ministerio de relaciones exteriores.*

AUSTRIA

Bericht der Staatsvertrags Kommission des Herrenhauses über den zu Rom am 26. Mai 1906 abgeschlossenen Weltpostvertrag. 1908. 41 p. (Herrenhaus, 47 der Beilagen zu den stenogr. Protokollen.)

Mariage, Convention pour régler les conflits de lois en matière de. 1907. 39 p. (Herrenhaus, 3 der Beilagen zu den stenogr. Protokollen.)

BOLIVIA

Colonización y agricultura, Memoria que presenta el Ministro de, al Congreso ordinario de 1908. La Paz. 65, lxiii. p.

CHILE

Mensaje leído por S. E. el Presidente de la república en la apertura de las sesiones ordinarias del Congreso nacional. 1°. de Junio de 1908. 51 p.

COLOMBIA

Mensaje del excmo. sr. Presidente de la republica e informes de los Ministros del despacho ejecutivo dirigidos a la Asamblea nacional constituyente y legislativa. 1908. xxxi., 111 p.

FRANCE

Conférence internationale de la paix, Deuxième. 1907. Documents diplomatiques. Supplément. Table analytique des matières. Paris, 1908. 50 p. *Ministère des affaires étrangères.*

HONDURAS

Informe presentado por el señor agente confidencial Dr. Don Miguel Oqueli Bustillo al Señor Presidente de la republica. 1908. 52 p.

Manifiesto que el señor Presidente de la república dirige a los Hondureños con motivo de haber terminado la guerra civil iniciada el 5 de Julio de 1908. 8 p.

PANAMA

Mensaje del Presidente de la república a la Asamblea nacional de 1908. Panama. 13 p.

Relaciones exteriores, Memoria presentada por el Secretario de, a la Asamblea nacional de 1908. lxxxix. p. *Secretaría de relaciones exteriores.*

PARAGUAY

Archivo diplomático y consular del Paraguay. Vol. 1. 1908. 167 p. *Ministerio de relaciones exteriores.*

Immigración, Datos estadísticos sobre el movimiento de, en el Paraguay desde 1882 hasta 1907. 16 p. *Ministerio de relaciones exteriores.*

Immigración y colonización, Memoria de la oficina general de, correspondiente a los años 1905-1906-1906-1907. 105 p. *Ministerio de relaciones exteriores.*

Reglamento para la colonia "Nueva Italia" en el departamento de "Villeta." 1907. 27 p. *Ministerio de relaciones exteriores.*

SALVADOR

Conferencia de paz Centroamericana, Documentos relativos a la. Tratados y convenciones concluidos por los delegados de las cinco repúblicas de Centro América a la conferencia de paz celebrada en Washington, D. C., el 20 de diciembre de 1907. Comunicaciones relativas a la ejecución de esos actos internacionales. 52 p. *Secretaría de relaciones exteriores.*

Contestación de la honorable Asamblea nacional de 1908 al mensaje del Señor General Fernando Figueroa, Presidente constitucional de la República de el Salvador. 1908. 8 p.

Demanda intentada por el gobierno de Honduras contra el gobierno de la República de el Salvador y contestación definitiva dada por éste ante la Corte de justicia Centroamericana con motivo de la supuesta ayuda del gobierno demandado en la revolución que estalló en Honduras durante el mes de julio último. San Salvador, 1908. 158 p. *Ministerio de relaciones exteriores.*

Mensaje del Sr. Presidente constitucional de la República de el Salvador, Gral. Fernando Figueroa, á la honorable Asamblea nacional de 1908. xi. p.

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Esclaves, Documents relatifs à la répression de la traite des, publiés en exécution des articles LXXXI et suivants de l'acte général de Bruxelles. 1907. Bruxelles, 1908. 338 p.

PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF
INTERNATIONAL LAW

ANNIE B. MASON V. INTERCOLONIAL RAILWAY OF CANADA AND TRUSTEES

197 Massachusetts Reports, 349

(February 26, 1908)

Tort for personal injuries received by the plaintiff while a passenger on the Intercolonial Railway of Canada at Moncton, New Brunswick. Writ in the Superior Court for the County of Suffolk, dated January 18, 1907.

Several corporations and one individual were summoned as trustees, who answered that they had in their possession effects and credits belonging to the Intercolonial Railway, which they would hold subject to the process served upon them if the court should be of opinion that it had jurisdiction to entertain the action. In each answer was included a copy of a letter of Messrs. Russell and Russell to the trustees stating that the funds held by the trustees to the credit of the Intercolonial Railway were "funds of the British Government and therefore in no way attachable or subject to detention by process of any court in this country."

KNOWLTON, C. J.:

This is an action brought by a trustee process to recover damages for personal injuries. The defendant has not appeared, but a member of our bar, as a friend of the court, following the practice approved by Chief Justice Marshall in *Osborn v. United States Bank*, 9 Wheat., 738, 870, has brought before the court a suggestion that the action be dismissed, and also an affidavit of the deputy of the minister of justice and attorney-general of Canada, including a copy of the "act respecting government railways," from which it appears that the so-called defendant, the Intercolonial Railway of Canada, is the property of His Majesty Edward VII, King of the United Kingdom of Great Britain and Ireland, in the right of his Dominion of Canada, and is not a corporation. The truth of the matters thus shown to the court is not questioned. It appears that no subject, private individual, or corporation has any

interest or concern by way of property or direction in the ownership or working of the Intercolonial Railway, but that it is owned and operated by the King, through his government of Canada, for the public purposes of Canada. All income arising from the operation of it is, by the laws of Canada, appropriated to the consolidated revenue fund of Canada, upon which fund all the expenses of the government of Canada are chargeable. All moneys and income due by reason of the operation or business of the railway are chargeable as belonging to the King, and are collectible in his name. Such moneys, when collected, are deposited to the credit of the minister of finance and register-general of Canada, and carried to the credit of the consolidated revenue fund, which fund is appropriated to the public debt and service of Canada. The cost of maintenance and operation of this railway is provided for by appropriation of the parliament of Canada out of the consolidated revenue fund, and all receipts from the working of the railway are a part of the moneys of Canada, appropriated to the consolidated revenue fund, and are not used for the maintenance or operation of the railway, except as the receipts from customs or excise duties or from any other branch of the public service are so used. See also *The Queen v. McLeod*, 8 Canada Supreme Court, 1, 23.

Upon this suggestion the question at once arises whether the court has jurisdiction of a suit which is virtually against the King of a foreign country. An answer in the negative comes almost as quickly.

The general subject of the immunity of the sovereign power from the jurisdiction of its own court was considered and discussed at great length by Mr. Justice Gray, in *Briggs v. Lightboats*, 11 Allen, 157, and, after an exhaustive review of the authorities, it was held that the action could not be maintained because the lightboats were the property of the United States, a sovereign power. Incidentally the question whether the public property of a foreign sovereign is exempt from the jurisdiction of the courts was discussed, and the cases bearing upon the question were reviewed. In the opinion, on page 186, we find this sentence, which is pertinent to the present case:

The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character.

In *Schooner Exchange v. M'Faddon*, 7 Cranch, 116, Chief Justice Marshall gives a very clearly reasoned statement of the principles which

control the courts in their decisions that they have no jurisdiction over a sovereign of a foreign state who comes within their precincts. The decision was that the courts of the United States had no jurisdiction over a public armed vessel in the service of a sovereign of another country at peace with the United States. At page 137 we find this statement of a reason for the law that governs such cases:

One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

The doctrine that the courts have no jurisdiction to proceed with a suit against the sovereign of another state is established in England in numerous decisions. It applies to all proceedings against the public property of such a sovereign. It was clearly laid down and applied in the cases of *Wadsworth v. Queen of Spain*, Q. B. 171, and *DeHaber v. Queen of Portugal*, 17 Q. B. 171, 196. It was again applied in *The Constitution*, L. R. 4 P. D. 39, and also in *The Parlement Belge*, L. R. 5 P. D. 197, where an elaborate review of the decisions is given by Brett, L. J., who says on page 214:

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory; and, therefore, but for the common agreement, subject to its jurisdiction.

In *Vavasseur v. Krupp*, 9 Ch. D. 351, 361, Lord Justice Cotton sums up the law as follows:

This court has no jurisdiction, and in my opinion none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially what we call the public property of the state of which he is sovereign as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented by the individual who is the sovereign.

In *Young v. The Scotia* [1903], A. C., 501,¹ there is an elaborate discussion of the exemption of public property from process of the courts of its own sovereignty. The doctrine was applied to a claim for salvage of a public vessel which was used by the Canadian government as a ferry boat, in connection with a line of railway and as a part of the general means of transportation, just as cars are used on the Intercolonial Railway. See also the very recent case of *The Jassy*, 75 L. J. P. D. & A. 93, where the principle suggested for our guidance was applied to a vessel which was the property of the King of Roumania.

The principles which have long been recognized as applicable to the dealings of all nations with one another, as well as the formal decisions of the courts, make it plain that this action must be dismissed for want of jurisdiction. The plaintiff must seek her remedy in the courts of the country in which she received her injury, where there is a statutory provision for such cases.

Action dismissed.

THE SCHOONER "EXCHANGE" V. M'FADDON ET AL.

Supreme Court of the United States, 1812

7 Cranch, 116

[NOTE.—In view of the fact that Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon et al.* is the leading authority on the immunity of foreign sovereigns from suit in national courts, it has been deemed advisable to print it in connection with the decision in the case of *Annie B. Mason v. Intercolonial Railway of Canada and Trustees*, in order that the reader may have at his disposal the literature on the subject.]

Appeal from the sentence of the circuit court of the United States for the district of Pennsylvania.

The schooner *Exchange*, owned by John M'Faddon and William Greetham, sailed from Baltimore, October 27, 1809, for St. Sebastians, in Spain. On the 30th of December, 1810, she was seized by the order of Napoleon Bonaparte; and was then armed and commissioned as a public vessel of the French government, under the name of *Balaou*. On a voyage to the West Indies, she put into the port of Philadelphia, in

¹ Where a ship is the property of the Crown, no action *in rem* or otherwise for salvage can be maintained. The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by statute. — *Headnote, Young v. The Scotia*, A. C. 501 (1903).

July, 1811, and on the 24th of August was libelled by the original owners. As no claimant appeared, Mr. Dallas, the attorney of the United States for the district of Pennsylvania, filed (at the suggestion of the executive department of the United States, it is believed) a suggestion that inasmuch as there was peace between France and the United States, the public vessels of the former may enter into the ports and harbors of the latter and depart at will without seizure or detention in any way.

The district judge dismissed the libel, on the ground that a public armed vessel of a foreign power, at peace with the United States, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which the foreign sovereign claims to hold her.

The libellants appealed to the circuit court, where the sentence was reversed — from the sentence of reversal, the district attorney appealed to this court.

MARSHALL, C. J.:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States?

The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restrictions.

All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory, with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer can not be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection,

that the license has been obtained. The character to whom it is given, and the object for which it is granted equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case. Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be, because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction, suppose him to be extraterritorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be erected and supported against the will of the sovereign of the territory: he is supposed to assent to it.

This consent is not expressed. It is true, that in some countries, and in this, among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations, that, without such exemption, every sovereign would hazard his own dignity, by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, can not intend to subject his minister in any degree to that power; and therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal

intended he should retain — privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be, because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it, would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration, that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable, that every immunity which would be conferred by a special license, would be, in like manner conferred by such general permit. We have seen, that a license to pass through a

territory implies immunities not expressed, and it is material to inquire, why the license itself may not be presumed?

It is obvious, that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act, not absolutely hostile in its character or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these, that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privileges by its irregular and improper conduct. It may, however, well be questioned, whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers, often, indeed, generally, attending it, do not ensue from admitting a ship of war, without a special license, into a friendly port. A different rule, therefore, with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation, generally, or any particular ports, be closed against vessels of war, generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them, while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect, in favor of vessels driven in by stress of weather or other urgent necessity. In such cases, the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty bids him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted,

any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent, necessarily implied, no just reason is perceived by the court, for distinguishing their case from that of vessels which enter by express assent. In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject, a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade.

These treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port, under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade, who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly, with much plausibility, if not correctness, that the same rule, and same principle are applicable to public and private ships; and since it is admitted, that private ships entering without special license become subject to the local jurisdiction, it is demanded, on what authority an exception is made in favor of ships of war?

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily, and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudiced.

Without deciding how far such stipulations in favor of distressed ves-

sels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister, can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed, that his sovereign means to subject him to the authority of the prince to whom he is sent; the latter, in receiving the minister, consents to admit him on the footing of independency; and thus, there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this can not be presumed, the sovereign of the port must be considered as having conceded the privilege, to the extent in which it must have been understood to be asked.

To the court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty, without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it, must be supposed to act.

When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the

government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption. But in all respects different, is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference can not take place, without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly, in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained, that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases, in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he can not be presumed to do, with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war, seized in Flushing, for a debt due from the King of Spain. In that case, the states generally interposed; and there is reason to believe, from the manner in which the transaction is stated, that either by the interference of government, or the decision of the court, the vessels were released. This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships, would appear to proceed from the same opinion.

It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed, as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion, which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth, are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argu-

ment has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, the *Exchange* must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the Emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is, therefore, said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the *Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

COSME BLANCO HERRERA AND JOSE BLANCO HERRERA, DOING BUSINESS
UNDER THE FIRM NAME OF HERRERA NEPHEWS, V. THE UNITED STATES

Court of Claims of the United States

(Decided May 4, 1908)

PEELLE, Ch. J., delivered the opinion of the court:

This action is founded on a claim for the use and damage for the detention of the steamship *San Juan*, owned by Spanish subjects, captured in the port of Santiago, Cuba, during the war with Spain, July, 1898. The seizure was by the Army, and no question of prize is involved.

But for the averment in the petition that the vessel herein was taken possession of by the United States "as private property and without any claim of title by reason of capture, or confiscation, or forfeiture," and used for lawful governmental purposes, the question of the liability of the United States might perhaps have been determined under rules 37 and 92 before either party had incurred expense in the taking of testimony.

This case is ruled by that of *Hijo v. The United States* (194 U. S. R., 315, 320), unless excepted therefrom by reason of the relation of the United States to Cuba. That case, like the one here, was for the capture, use, and damage for detention of a vessel, owned by Spanish subjects, in the port of Ponce, P. R., at the time of the capture and surrender of that port and city in July, 1898, to the naval and military forces of the United States.

There, as here, the vessel was used or detained by the military forces under the orders of the Quartermaster's Department of the Army until April, 1899, when the vessel, as here, was returned to the owners on condition that all claims for use or damage for detention should be waived, which was done.

In each case the vessel captured was owned by Spanish subjects, and the capture, use, and detention of the vessel occurred during the war with Spain, which war, says the court in the case cited, "did not in law cease until the ratification in April, 1899, of the treaty of peace."

In that case the contention was that the claim arose out of an implied contract, and that an action could be maintained thereon under section 1 of the act of March 3, 1887, commonly known as the Tucker Act. (24 Stat. L., 505.) But in response to that contention the court, by Mr. Justice Harlan, said:

The present suit finds no sanction in the above act, even if the plaintiff were not a foreign corporation. Its claim is not founded on the Constitution of the United States, or on any act of Congress, or on any regulation of an Executive Department. Nor can it be said to be founded on contract, express or implied. There is no element of contract in the case, for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war, and not for any purposes of gain. * * * The seizure, which occurred while the war was flagrant, was an act of war, occurring within the limits of military operations. The

action, in its essence, is for the recovery of damages, but, as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. "A truce or suspension of armies," says Kent, "does not terminate the war, but it is one of the *commercium belli* which suspends its operations. * * * At the expiration of the truce hostilities may recommence without any fresh declaration of war." (1 Kent, 159, 161.) If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract because of the retention and use of the vessel pending negotiations for a treaty of peace. Besides, the treaty of peace between the two countries provided that "the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United States will adjudicate and settle all claims of its citizens against Spain relinquished in this article." This stipulation clearly embraces the claim of the plaintiff — its claim against the United States for indemnity having arisen prior to the exchange of ratifications of the treaty of peace with Spain.

We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail, for it is well settled that in case of a conflict between an act of Congress and a treaty — each being equally the supreme law of the land — the one last in date must prevail in the courts. (*The Cherokee Tobacco*, 11 Wall., 616, 621; *Whitney v. Robertson*, 124 U. S., 190, 194; *United States v. Lee Yen Tai*, 185 U. S., 213, 221.)

We have thus quoted from that case at length because the ruling and language in that case cover the present case completely, unless excepted therefrom by reason of the peculiar relation of the United States to Cuba, and as to that let us now inquire.

It must be borne in mind that at the time of the capture and use of the vessel in question Cuba was under the dominion and sovereignty of Spain, and so remained until relinquished by the terms of the treaty of Paris, when, on December 13, 1898, the United States, pursuant to the terms of that treaty, entered into the occupancy of said island and established therein a military government and maintained the same under the direction of the President as Commander in Chief of the Army and Navy of the United States until May, 1902, when the government and control of the island were transferred to the President and Congress of the Republic of Cuba.

Even if it should be conceded that the surrender of the port and city of Santiago to the military and naval forces of the United States in July, 1898, carried with it the sovereignty of the United States over that particular district, still by the protocol of August 12, 1898, the United States in effect conceded the sovereignty of Spain over the island. The protocol — a basis for the establishment of peace — which in terms suspended hostilities between the two countries, did not operate either to suspend or terminate the sovereignty of Spain over Cuba. By article V thereof provision was made for the appointment of commissioners to meet at Paris not later than October 1, 1898, to treat of peace; and it was not until by article I of the Treaty of Paris of December 10, 1898, that Spain relinquished "all claim of sovereignty over and title to Cuba." Hence the United States thereby recognized the sovereignty and authority of Spain over Cuba until terminated by the treaty; and though for some purposes the military authorities of the United States had prior thereto exercised dominion over particular parts of the territory acquired by conquest, the island nevertheless was foreign territory, held in trust by the United States for the inhabitants thereof. The conquest was not with the intention of holding or taking title to the island or any part thereof, as had previously been declared by the joint resolution of Congress.

In other words, "during the continuance of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operations, or express provisions, extinguishes his title forever" (Sec. 545 Wheaton's International Law and authorities there cited). Here, while by the treaty the sovereignty of Spain was relinquished, it was not transferred to the United States, so that the authority of the United States over the island or any district thereof was, as expressed in said joint resolution, only "for the pacification thereof."

In the case of *Neely v. Henkel* (180 U. S., 109, 120) the court, after reviewing the objects intended to be accomplished by the war with Spain and the military occupation thereof as disclosed by public acts and official documents, said:

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy

of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States — indeed, as between the United States and all foreign nations — Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

But the contention of the claimants is that their action is based on the Executive order of the President of July 13, 1898, which was promulgated by the Secretary of War in General Order No. 101, July 18, 1898, providing, among other things, as follows:

Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained. * * *

Private property taken for the use of the Army is to be paid for, when possible, in cash at a fair valuation; and when payment in cash is not possible receipts are to be given.

The contention is that the order of the President so promulgated is a regulation of the War Department, and that, therefore, they are entitled to maintain their action thereon under section 1, act of 1887. But this question, we think, is fully met by the ruling in the case of *Hijo v. The United States*, *supra* — that is to say, “the seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898.” And this, we think, applies with equal force to Cuba as to Porto Rico, as the vessel captured was owned by Spanish subjects, natives of Spain, residing in Cuba. Native Spaniards who were Spanish subjects residing in Cuba during said war were enemies, and their property was entitled to no more protection from the United States than other Spanish subjects, and particularly when, as in the present case, the vessel prior to its capture had been used in transporting Spanish

troops, munitions of war, and supplies for the Spanish troops from place to place.

While the military and naval forces of the United States were enjoined by the Executive order to respect "private property, whether belonging to individuals or corporations," it also authorized the confiscation of such property for cause. Besides, the same order authorized the seizure, by the military occupant, of the means of transportation, including "telegraph lines and cables, railways and boats," although such property belonged to private individuals or corporations. True, when so seized the order directed the return of such property "unless destroyed under military necessity."

The Government, in the present case, elected to return the vessel instead of destroying it, but the return thereof is an argument in favor of the generosity of the Government and not a confession that the seizure was not an act of war.

But it is contended that the joint resolution of Congress respecting the independence of the people of Cuba and the relinquishment of Spanish authority in the island, coupled with the disclaimer on the part of the United States to exercise sovereignty, jurisdiction, or control over said island — other than for the pacification thereof — operated to constitute the people of Cuba an ally to force Spain to relinquish her authority and control in said island, thereby segregating from Spanish territory as enemy's country said island.

And from official documents as well as from the history of the time, of which the court takes judicial notice, the insurrectionists in said island against the Government of Spain did cooperate with the military forces of the United States in liberating Cuba from Spanish control. But the island was nevertheless under the sovereignty and control of Spain during the capture and use of the vessel in question, which capture and use were held by the executive department of the Government as a military necessity arising in the belligerent prosecution of the war, and for that reason the Department denied to the claimants herein any compensation therefor.

What the United States did to establish and maintain the freedom and independence of Cuba was voluntarily undertaken and done; and in the execution of the purpose of the joint resolutions it was the judgment of the President, charged therewith, that the capture of the vessel and its use for the military and humane purposes set forth in the findings were for purposes of war and not for gain. In this view of the case

individual rights must give way to the rights of the people of Cuba, for whose independence the United States intervened and for whose benefit the island was later held in trust.

But if we should assume that because of the acts of the United States the island was not enemy's country and the claimants, by reason of their residence in Cuba, were not enemies, still the court would be confronted with Article VII of the treaty of Paris, which provided that "the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war."

The claimants herein were not only Spanish subjects, but were natives of Spain, so that whatever claim may have accrued to them against the United States during said war was relinquished in the treaty by the act of Spain.

Nor do we deem it material in the present case to consider the difference between native Cubans as subjects of Spain and natives of Spain who were subjects thereof residing in Cuba, for it is clear that whatever claim the subjects of Spain had against the United States from the date of the insurrection in Cuba to the date of the exchange of ratifications of the treaty were relinquished; and while the United States by Article VII of the treaty agreed to "adjudicate and settle the claims of its citizens against Spain," thereby protecting Spain against the claims of any citizen of the United States, Spain did not obligate itself by the treaty to pay the claims of her subjects against the United States which she had relinquished, but we do not see that this is material or that it in any way strengthens the claimants' right to recover for the use or damages for the detention of their vessel. By the act of Spain the United States were released from the payment of such claims, and they can not now be asserted against the United States.

True, within the time prescribed by Article IX of the treaty the claimants renounced their allegiance to Spain, and thereby adopted the nationality of Cuba; but that was long after the capture, use, and detention of the vessel and after the return thereof to the claimants, as set forth in the findings.

We deem it unnecessary to enter upon a discussion of the circumstances under which the vessel was restored to the claimants further than

to say that no right to recover for the use and detention of the vessel can be predicated on the action of the War Department in requiring the claimants to accept the return of their vessel under the circumstances of this case, for even if the claimants had been permitted to receive the vessel under protest, reserving in the receipt in express terms their right to prosecute a claim for the use and detention of the vessel, it would have availed them nothing, as there was no element of contract either in the capture, use, or detention of the vessel, nor was anything said by the officers of the Government from which there could be implied an agreement or obligation to pay therefor, and the claim being one sounding in tort no action will lie thereon against the United States on the order of the President.

For these reasons the numerous cases cited by the claimants, to the effect that where the Government appropriates private property which it does not claim as its own it does so under an implied contract to pay therefor, have no application in this case. Nor has the case of the Philippine Sugar Estates Development Company (40 C. Cls. R., 33), for the reason that at the time of the taking of the property in that case war with Spain had ceased; the Philippine Islands had been ceded to and were under the control and dominion of the United States; the country had been reduced to subjection before the taking of the property, and hence it was held that an implied contract arose to pay for the property so taken. But that is not the case here, as the capture and use of the vessel were both during the war with Spain, and even before the occupation of Cuba by the military forces of the United States.

Although we have reached the conclusion that the case of *Hijo v. The United States*, *supra*, is controlling in the present case, notwithstanding the peculiar relation of the United States to Cuba, we have found the facts on the merits of the case for the reason that in the case just cited the court, in concluding its opinion, said:

We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail, for it is well settled that in case of a conflict between an act of Congress and a treaty—each being equally the supreme law of the land—the one last in date must prevail in the courts.

So that if, in case of appeal, the Supreme Court should differ with this court and hold that an action could be maintained under the act of March, 1887, they would then have before them the question whether the treaty, as in that case, operated to relinquish the claim herein.

For the reasons we have given we must hold that the court is without jurisdiction; and we may add that if we should take jurisdiction, we should feel constrained under the wording of the treaty to apply it in this case, so that in either event the claimants must fail; and for that reason their petition is dismissed.

PASCASIO DIAZ, ENRIQUE DE MESSA, AND ROBERT SCOTT DOUGLAS, TRADING
AND DOING BUSINESS UNDER THE FIRM NAME OF GALLEGO, MESSA &
COMPANY, V. THE UNITED STATES

Court of Claims of the United States

(Decided May 4, 1908)

Per curiam.

The facts in this case are practically the same as those in the case of *Cosme Blanco Herrera et al. v. The United States* (43 C. Cls. R., —), decided contemporaneously with this; and the decision in that case controls this unless the use of the wharves and the citizenship of one of the claimants herein — a British subject — operates to vary the rules announced therein.

The wharves, as well as the steamship *Thomas Brooks*, were seized and used by the military forces of the United States as an act of war within the limits of military operations, and, therefore, under the ruling in the case of *Hijo v. The United States* (194 U. S., 315), as applied to captures in Cuba by the ruling in the case of *Cosme Blanco Herrera, supra*, no action will lie therefor against the United States.

Two of the claimants herein were subjects of Spain, while one, Robert Scott Douglas, was a British subject. But a foreigner residing in a state of war with another state is subject to the jurisdiction and control of the state wherein he resides and does business, and his property being an element of strength to the state wherein he resides "may reasonably be treated as hostile by an enemy." That is to say, "enemy character may thus attach either to persons of neutral national character, and to their property as attendant on them, or to property owned by neutrals in virtue of its origin, or of the use to which it is applied." (Hall's Int. Law, 5th ed., p. 497.)

Such also was the view of this court in the case of *The Juragua Iron Co. v. The United States* (42 C. Cls. R., 99, 111), where the court said:

The law seems to be well settled that when a citizen of one belligerent country is doing business in the other belligerent country, and has built up and purchased property there which has a permanent situs, such property is subject to the same treatment as property of the enemy. At first sight this rule of law seems to be a harsh one, but when we consider that the property therein situated is a part of the assets of a country, and in a certain sense a part of the country itself, and further consider the difficulty, in stress of war, of discriminating between enemy and citizen property situated in the same country, the rule seems to be reasonable and necessary.

In the present case the findings show that the vessel prior to its seizure by the United States military forces had been employed in the transportation of Spanish troops and munitions of war from place to place.

Had the vessel been owned exclusively by said Douglas — the British subject — its use in transporting troops and munitions of war for the Spanish Government, however innocent the owner's intention, would have been service to a state engaged in active hostilities against the United States. But for the purposes of this case we deem it unnecessary to hold that he had thereby forfeited his neutral character; and so, treating him as a neutral individual residing in Cuba, the obligation was upon him to "be prepared for the risks of war;" and that being so, he "can not demand compensation for loss or damage to property resulting from military operations carried on in a legitimate manner." (Hall's Int. Law, sec. 269.)

In this respect he stands in no better position than a subject of Spain. The petition is dismissed.

BOOK REVIEWS

International Law. Part I: Peace; Part II: War. By John Westlake, K. C., L. L. D., Whewell Professor of International Law in the University of Cambridge, Late Fellow of Trinity College, Cambridge, Honorary L. L. D. of the University of Edinburgh, Member and Late President of the Institute of International Law. Published at the University Press, Cambridge, 1904 and 1907. pp. 356 and 334, respectively.

Professor Westlake was born eighty years ago on the 4th of February last and after twenty years of honorable service resigned his professorship at Cambridge last spring, neither mind nor body having failed except that his voice was no longer adequate for lecturing.

After a brilliant career at Cambridge, where he was sixth Wrangler and sixth in first class Classical Tripos, he read law at Lincoln's Inn and was called to the bar in 1854. His first important work, "A Treatise on Private International Law or the Conflict of Laws," was published fifty years ago, in 1858, within four years after his call to the bar, and is now in its fourth edition.

In 1874 he "took silk," and was made a Bencher of Lincoln's Inn. In 1885 he was elected to Parliament from the Romford Division of Essex. In 1894 he published "Chapters on the Principles of International Law." He has been decorated by the Mikado of Japan and the King of Italy. He is especially identified with the foundation and entire existence of the Institute of International Law, and has served as a member for the United Kingdom of the International Court of Arbitration at The Hague.

The ripe productions of such a scholar and specialist in international law certainly deserve notice here.

The preface to the first volume announces that the books "are not intended as an encyclopedia of international law. The aim has been to give a knowledge of the most important topics to English university students and average Englishmen interested in public affairs, neither of them a class which can devote very much time to a single science, and to put them in a position to appreciate the discussion on other topics as they arise in the foreign affairs of the country."

The purpose is much the same as that for which Sir William Blackstone wrote and delivered at Oxford University his "Lectures on the Laws of England," in their final form, just a century and a half ago, except that it is confined to a more limited branch of the law.

The volume on "Peace" deals briefly with a "General view of international law, its sources and principles;" the "Classification of states, their origin, continuity, and extinction;" "Title to state territory and minor territorial rights," "Rivers," "The sea and territorial waters;" with "Nationality and alienage," "National jurisdiction," "Diplomacy," "The political action of states and protection of subjects abroad," "Interoceanic ship canals," and, in an appendix, with the wonderfully expanding topic of "International arbitration."

Perhaps this table of contents is sufficient to show the scope and purpose of this work and, considering that it has been before the public four years, we need not discuss it further, giving the space allowed to the second volume, on "War," so recently published.

The completion of this second volume was delayed until the close of the session of the Second Hague Conference in order to embody its important results as to the law of war, although much of the book was printed at an earlier period. The proceedings at The Hague are dealt with in a closing chapter, but also referred to and incorporated in earlier portions of the book. It ought to be added that Professor Westlake published in the *Quarterly Review* for January, 1908, an extended, vigorous, and critical review of the works of the Hague conferences, which may be profitably consulted in connection with this work.

Each volume has its own index and the second contains a table of cases, always so desirable in a law book, and so often omitted by less thorough or less lawyer-like writers on international law.

The contents of the second volume are "War and forcible measures short of war" and "Legal relations as affected by war;" the "Laws of war in general;" "The laws of war on land," being the Hague regulations, with a commentary, and such regulations considered generally; "Naval war as between belligerents;" "Neutrality, and duties of neutral states;" "Blockades;" "Contraband of war;" and a chapter covering 61 pages devoted to "The Hague Conference of 1907."

The form of the composition is distinctly that of a university lecturer, defining and seeking to classify his subjects, giving a limited number of references or citations, yet displaying always a full and adequate knowledge, not merely of the commentaries and decisions, but also of the cor-

respondence and official announcements which have settled international law and procedure.

The orderly and lucid marshaling of the facts derived from the very widest historical survey of the subject is a most successful feature of the book, as in the discussion of "The commencement of war between the belligerents," including "Declaration of war" (pages 18 to 26), in which, starting with the rules of Grotius, we see the whole tableau of procedure unrolled down to the communications between the Spanish Government and General Woodford, the United States minister at Madrid, on April 21, 1898, and the ultimatum delivered on behalf of President Krüger to the British agent at Pretoria on October 9, 1899, and the communications between Mr. Kurino, Japanese minister at St. Petersburg, and Count Lamsdorff in 1904.

The clearness, fullness, and succinctness of these statements illustrate a chief merit of the book consistently displayed throughout on the vexed question of "Pacific blockade." Professor Westlake sums up by concluding that "as against the *quasi* enemy it is too well established as a recognized institution to be longer attacked with serious hope of success."

Professor Westlake very stoutly opposes the German doctrine of Lueder and others that the laws of war are liable to be overridden by necessity on the plea "that commanders will act on it, whatever may be laid down." "This ground," he says, "reduces law from a controlling to a registering agency" (see page 115).

This writer is constantly struck by the fullness of knowledge displayed in the thousands of illustrations introduced from actual practice where the incidents, poured in a steady stream of narrative from the well-filled mind of Professor Westlake, give a more complete understanding than standard works which have assumed to discuss the question at some length, as witness the account of the sinking of the British ships at Rouen by the Germans during the Franco-Prussian war (page 118).

In discussing the immunity of coast fisheries from capture he finds evidence of its existence in the Middle Ages in a pleasant passage from Froissart that "fishermen on the sea, whatever war there were between France and England, never did harm to one another, so they are friends and help one another at need."

The book is throughout remarkably free from ill temper or partisanship (so noticeable in Hall's otherwise admirable work), even in the discussion of such tempting topics for acrimony as the taking of Mason

and Slidell from the *Trent*, and that of "continuous voyages," though as to the latter he says:

In the United States during the civil war the carriage of contraband was generally presented to the courts in connection with blockade running, to which the doctrine of continuous voyages does not apply. The offense of blockade running, consisting in the attempt to communicate with a prohibited port and not in the introduction of a prohibited class of goods, is essentially one of the ships and not an offense of the goods, except as derived from that of the ship.

The reviewer, as a teacher of international law and a humble writer thereon, welcomes Professor Westlake's volumes as wonderfully luminous and, in short space, encyclopedic. He finds in them a happy contrast to those works, so often produced by the publishers with ample advertisements, where an unlearned but assiduous person has been hired to produce, at small cost, a string of citations, animated and guided by no depth of knowledge and no general conception as to the matter in hand. Professor Westlake's *ipse dixit* has more weight than many pages of such hack work. The writer is glad to add that he has recent assurances in personal letters from Professor Westlake that the activities of his pen are to continue, and he ventures to express the hope that the History of International Law which Professor Westlake included in his original plan may follow. No one is better equipped to undertake it. One slight criticism ought to be made. The indexes, as is so often the case in English books — as, for instance, in Phillimore's famous Commentaries — are very much curtailed, quite inadequate, and might, it is submitted, with great advantage in a work whose every page contains so much of value, be greatly expanded.

CHARLES NOBLE GREGORY.

The Elements of International Law, with an Account of its Origin, Sources, and Historical Development. By George B. Davis, Judge-Advocate-General, United States Army, Delegate Plenipotentiary to the Geneva Conference of 1906 and to the Second Peace Conference at The Hague, 1907. Third edition. Revised to date, including the results of the Second Peace Conference at The Hague in 1907, and other new material. Harper & Brothers, publishers: New York and London. 1908.

The first edition of this work appeared in 1887. The second, and last edition before that here considered, was issued in 1903 and contained 612 pages.

The present (third) edition contains 673 pages, a growth of 61 pages in five years.

The general text in the former edition covered 497 and in the last edition but 501 pages, an expansion of 4 pages only. The appendices in the former edition covered 79 pages; in the new edition 138 — an increase of 59 pages — and this increase is more than covered by "Appendix F," containing 70 pages, devoted to some brief introductory remarks concerning and transcripts or abbreviated statements of the agreements of the Second Hague Conference. In a few places these are annotated.

General Davis in his preface says that —

The labors of the Second Peace Conference were so fruitful of important results and touched the practice of international law at so many points as to make it imperative to recast and amplify the text of several chapters.

He adds further :

So far as it has been practicable to do so, the text of the present edition has been brought up to date and into harmony with the existing rules governing the relations of sovereign states in both peace and war.

General Davis's book has especial importance as it is the text in international law used at the United States Military Academy at West Point, from which our army officers especially derive their ideas as to the law of nations. It is a limited handbook, quite elementary in its treatment, very general and miscellaneous in many of its citations, and "was originally intended" for "undergraduate students of American colleges and law schools." It formulates the rules of law somewhat more positively, perhaps, than the more ample and advanced works, but adds reference to standard texts for fuller discussion.

The appendix containing the results of the Second Peace Conference is of distinct value and seems absolutely necessary in a text-book intended to be used at the United States Military Academy, since the action of that conference (as ratified) settled or modified numerous rules as to topics of vital importance to army men, as "The opening of hostilities," "The laws and customs of war on land," "Rights and duties of neutral persons," and "Discharging projectiles from balloons," besides quite as extensively regulating the rights and duties of belligerents and neutrals in naval warfare.

The text of the conventions and recommendations can be found much

more amply in many places, as Document No. 444 of the United States Senate, Sixtieth Congress, first session, or in the admirable volume edited by Dr. James Brown Scott of the State Department and published by Messrs. Ginn & Co., 1908, giving the texts of both peace conferences in French, with English translations and related documents, but its presence as an appendix in a convenient and inexpensive handbook of international law is certainly desirable and is ample excuse for the new edition.

It can not be said that the text of the book in general seems to have been revised or adequately brought up to date. There is no table of cases, which omission is felt by one used to law books, but a search of the general index indicates that such an important case as *Mortenson v. Peters*, decided by the High Court of Justiciary of Scotland (full bench) as to the jurisdiction of Great Britain over the Moray Firth in 1905 (see *AMERICAN JOURNAL OF INTERNATIONAL LAW*, vol. 1, p. 526) has escaped attention. Even such an important and decisive case as *The Paquette Habana, The Lola* (175 U. S., 677), holding in 1899, in one of the late Mr. Justice Gray's cyclopedic opinions, that certain fishing boats are exempt from capture, seems to have escaped citation. The subject is treated on page 61, but this authoritative case is not cited; neither is the provision adopted by the Second Hague Conference to like effect cited in that connection, though of course it is found in the appendix (p. 598). A much more thorough revision of the text and modernization of the citations would certainly have added to the value of this new edition.

Even the index seems not to have been thoroughly revised so as to conform to the very slight change in the pagination, as, for instance, in the index to the new edition we find the title "Fishing boats, exemption from capture, 374, 375, 597." There is nothing on the subject at any one of the three references, but the subject is treated at pages 374 and 375 in the former edition.

A small error is apparent even in the prefaces as printed in the last edition. The preface to the second edition purports to be reprinted. That preface originally contained this passage:

In the systematic study of the subject it is suggested that Doctor Francis Wharton's exhaustive and invaluable digest of the international law of the United States be habitually used in connection with the excellent volume of cases in international law prepared by the late Prof. Freeman Snow of Harvard University.

Where this is reprinted in the last edition the eulogistic adjectives are very slightly modified, but "Professor John Bassett Moore's valuable and exhaustive digest" is substituted for "Doctor Francis Wharton's exhaustive and invaluable digest,"

As Mr. Moore's digest appeared in 1906, three years after the second edition of General Davis's book, it of course could not have been referred to in the preface in question and a reprint of the preface with such an alteration yet still given as "preface to the second edition" is certainly an error. In the same way the cases by "Dr. James Brown Scott, Solicitor of the Department of State," are mentioned in this reprint of the old preface. Those quite invaluable cases were published in 1902 and might have been very properly referred to in the preface published in 1903, but were not, and moreover Dr. Scott was not Solicitor of the Department of State until 1906, three years after that preface was published. The preface which assumes to be reprinted seems to have been revised and the text which assumes to have been revised seems to have, in the main, been merely reprinted. It may seem ungracious to mention these, perhaps minor, inaccuracies in the work, but they give the impression that the learned and distinguished official whose name gives reputation to the work has, in the pressure of affairs, trusted the revision to a somewhat negligent or hurried assistant and it is hoped these blemishes may disappear from later editions of so widely used a handbook.

CHARLES NOBLE GREGORY.

Treatise on Private International Law. By George Streit. Athens: 1906.

One of the most valuable contributions to private international law published recently is the Greek work of Prof. George S. Streit, of the National University of Greece, which appeared in Athens in 1906.

Modern Greece ever since her independence has striven for the revival of Greek literature, both within and without the narrow boundaries of her territory which were assigned to her by the "protecting powers" of Europe, who contributed to her regeneration. The establishment of the National University of Athens gave a great impetus not only to learning in general, but also to the study of the law, and particularly of the Roman law, which was the law of the land before the Turkish conquest, it being now simply revived. Notwithstanding the existence of a law school at Athens, it is in the European centers of learning, and particu-

larly in those of Germany, that many of the law students of Greece complete their studies and in some cases acquire even all their legal knowledge. Hence, the trend of the minds of some Greek jurists leans toward the German mode of expression, the language used being not the old Attic tongue, but the so-called modern Greek, which is merely Greek in analytical form.

A good many commentaries on the civil law have already been published in Athens, the writers encountering little difficulty in the language question, because they could use the consecrated phraseology of the law books of the Byzantine epoch; but it was not an easy task to write on a new subject, in which it became necessary to coin new legal terms. It was given to the late N. Saripolos of Cyprus to overcome the difficulty by publishing for the first time a treatise in Greek on public international law.

But no book on private international law was up to the present day published in Greek, at least as comprehensive as that written by Prof. G. S. Streit — consisting of five volumes, of which only the first volume has so far been published, which we are now proposing to review.

The work is written in a language as near as possible to the Attic tongue, and any Hellenist may be able to understand it without difficulty. The author being principally trained in the German legal language, he does not seem to have escaped a Teutonic tincture in the mode of expression and generally in the shaping of his legal phraseology.

Coming now to the work itself, one can not but be struck with the erudition and learning of the author and the sound judgment he displays in his criticism of opinions not shared by himself. The quotations from foreign and especially German writers are so copious and so appropriate that one can not but conclude that Professor Streit made the most diligent research in order to make his work as complete as possible, and judging from the first volume it is certain that after the publication of the remaining four volumes it will occupy a prominent position not only in the legal science of Greece, but also in that of other countries.

As the author tells us in the preface of this book, the first volume will be a "dogmatic and historical introduction" to the general work.

This book is divided into three parts, the first being an introduction, the second consisting of a historical review of private international law, and the third dealing with the progress of codification made on the conflict of laws. An appendix containing the various international conventions on this subject and a complete bibliography exhaust the contents of the first volume.

Part I. — In the first part, after criticising the consecrated term of “private international law,” which he does not consider as being appropriate, though he adopts it himself as being of universal use, Professor Streit examines the origin or foundation of the conflict of laws, and tells us that the Anglo-American theory of the *comitas gentium*, according to which the judiciary of a state apply in some cases the foreign law, merely by courtesy, has been abandoned as being inconsistent with the modern view of the continental jurists, that in the society of nations the application of foreign law is a legal obligation. The author, after adopting the division of private international law into that of a narrow sense on one hand and broad sense, and subdividing the former into civil and commercial private international law, the latter including that of bankruptcy, of maritime, of bills and notes, and insurance, explains the private international law of procedure and that connected with criminal law.

Professor Streit then tells us that private international law in broad sense consists not only of the conflict of laws, but also of the question concerning the jurisdiction of a state in criminal cases; the assistance to be afforded to a foreign state to bring criminals to justice; and, lastly, the exposition of the rules governing the *status* of aliens. The author adds that his treatise will deal with all of these subjects.

After discussing whether private international law is part of the public or private law, he adopts the opinion of certain writers that it is part of the latter system on account of its intimate connection with states and that it has a tendency to become part of international law proper, though strictly speaking is connected with the internal law of a state.

Professor Streit concludes the first part with an examination of the sources of private international law, and considers that the statutory and customary laws of a country and conventions regulating conflicts of laws, and even some principles of public international law, are the sources of private international law. He does not share the views of certain jurists who consider as sources natural law, legal science, and the law of adjudication. He seems to overlook the importance of judicial decisions in the countries where the English common law is in force, and his statement that the law of adjudication can not be considered as a source of law, even in municipal law, because the courts merely expound existing laws, does not certainly apply to the Anglo-American system of jurisprudence, in which a uniform construction of a

law is binding to a great extent upon the courts who subsequently pass upon the same subject.*

Part II. — In part second we have an exhaustive exposition of the conflict of laws from the ancient times up to the present day. After referring to the laws and customs of the ancients, Professor Streit gives us some details in regard to the condition of the Greek colonies in Egypt, where they had been given by the Egyptian Kings the privilege of being governed by their own laws.

The sketch of the Hellenic jurisprudence in regard to aliens and the privileges granted to them by special compacts is one of the most interesting chapters of this part. Here also the author deals with the much-mooted question of consuls in ancient Greece. We are informed that the then existing "consuls" had some resemblance to the modern consuls because they were chosen either amongst aliens to whom their native country intrusted the care of the interests of their citizens, or, as was the case more usually, they were citizens of the city in which the foreigners resided, which corresponds in some way to the modern "honorary consuls" when the nationals of a state act in such capacity for a foreign country.

The Roman epoch is also described in a very learned manner and the numerous quotations in the book show the thoroughness of the work. The author follows, step by step, the juridical situation of aliens in the Roman State, and concludes with a skilful sketch of the development of the *jus gentium*, which occupied such a prominent part in the legal science of Rome.

Professor Streit, after reviewing the conflict of laws in the Middle Ages and referring to the prevalence of the *personal law* during the Carlovingian epoch, and the *lex rei sitæ* during the feudal times, concludes with an exposition of the privileges enjoyed by various foreign communities in Constantinople during the Byzantine Empire, when such foreigners were permitted to have judges of their own for the adjustment of their differences. Therefore, the origin of the so-called "capitulations" in Turkey is even anterior to the grant made to King Francis by Sultan Suleiman in the sixteenth century.

This chapter ends with a review of the works of some eminent Italian jurists of the Middle Ages, who are considered, together with the Germans, the real founders of the law of conflicts.

Part III. — The author in the third and last part of this volume explains the various attempts made to embody in international compacts

a uniformity of legal principles connected with private international law and the results already obtained. He subsequently deals with the juridical condition of aliens in different countries, the famous doctrine of the *statua personalia*, *realia* and *mixta* occupying a prominent place in this exposition, and ends with a review of international criminal law and of the law of extradition.

After acknowledging the great services rendered to private international law by the Italian writers, and particularly by Mancini, he pays a glowing tribute to the great Savigny, the founder of the theory of the obligatory force of foreign laws in certain cases. Professor Streit concludes the subject by pointing out the tendency of the recent Anglo-American jurists to abandon the old theory of *comitas gentium* and to adopt the German view.

Such is a summary review of the volume of Professor Streit's book on private international law. It is to be hoped that the author will furnish us with a French or German text of his work, so that it may be understood by others than Hellenists or Greeks.

THEODORE P. ION.

American Diplomacy under Tyler and Polk. By Jesse S. Reeves, Ph. D., Assistant Professor of Political Science in Dartmouth College. Baltimore: The Johns Hopkins Press. 1907. pp. 335.

Between the years 1841 and 1848 four great issues in our national development pressed critically forward and found final adjustment — the Maine boundary, the annexation of Texas, the Oregon boundary, and the war with Mexico resulting in the acquisition of California. Each of these issues involved a question of national boundary. All except the first involved the bigger and more dramatic question of the westward expansion of the nation. Upon the assumption that these boundary questions demarcate an epoch reasonably distinct in the history of American foreign relations, Dr. Reeves has presented us with a little volume which in many ways is a real contribution to the diplomatic and political history of the United States.

The first two chapters, devoted to the diplomacy of the northeastern boundary dispute, furnish perhaps the least interesting and least satisfactory portion of the work, although this is doubtless due in large measure to the nature of the questions involved. The controversy had its origin in boundary designations set forth in the treaty of 1783, which

conformed in no wise to the geography of the regions described. Few, if any, principles were applied or developed. Settlements of the mooted boundary was delayed through many years by the uncompromising attitude of both nations, aggravated and embarrassed on the part of the United States by the stubbornness of Maine and Massachusetts. Dr. Reeves describes in some detail how the diplomacy which led up to the Webster-Ashburton treaty was hampered and embittered by the *Caroline* affair, the McLeod arrest, and the *Creole* affair; but upon these well-known incidents of our diplomatic history he throws little new light.

Beginning with the third chapter Dr. Reeves takes up the diplomacy of the three great expansive movements, toward the Rio Grande on the south and toward the Pacific on the north and south. There are certainly many who would dispute with Dr. Reeves the assertion that "in its essentials the expansion of the United States to the southwest is not radically different from its expansion over the Mississippi Valley, to the northwest into Oregon, and on across the Pacific to Hawaii and the Philippines." The expansion of a state toward natural geographic boundaries over contiguous territory almost wholly unsettled (or settled sparsely by emigrants from the expanding state) is so intrinsically different in purpose and result from the extension of sovereignty over a remote territory in the eastern seas, occupied by people of another race exhibiting various stages of civilization, that, far from being essentially alike, these two directions of expansion present no points of similarity at all save that both are instances of territorial acquisition. It will, however, perhaps be generally admitted that the national impulses which led to the expansion of the United States over Texas, Oregon, and California were fundamentally identical.

Chief interest in the work of Dr. Reeves possibly centers in his two theses: (1) That the annexation of Texas, instead of being, as Von Holst and others have depicted, the triumph of a deep-laid conspiracy on the part of the South for the extension of slavery, was in its inception a nonsectional movement, prompted by larger national motives, and that it was only in its later stages, when slavery had grown to be a national question coloring every political issue of importance, that Texas annexation and slavery extension became identified; and (2) that the annexation of Texas and the war with Mexico which followed "were separate episodes which had no necessary connection," the latter being in reality an offensive war waged for conquest and aggrandizement.

The first of these theses is admirably sustained, Dr. Reeves going so

far as to show that the union of the Texas issue with that of slavery extension in reality only retarded and in the end came near to wrecking the cause of annexation. The latter thesis he supports by endeavoring to show that Polk came to the presidency with a well-developed plan for wresting California from Mexico, by diplomacy and purchase if possible, by war and conquest if necessary. Unsatisfied claims of American citizens against Mexico, which had been grist for contention between the two Republics through many years, furnished the groundwork for the plan. It is perhaps true enough that Polk coveted California from the beginning, that he made an abortive attempt to secure the territory through diplomatic channels, and that he took steps to make certain that California should be the fruit of the war, if war resulted. But it must be remembered that Mexico had long ago declared that annexation must be considered "as equivalent to a declaration of war," that she steadily refused to renew the diplomatic relations which she had severed upon the annexation of Texas, and that since 1845 she had been amassing her troops at Matamoros, on the south bank of the Rio Grande. There is no evidence to show that Mexico intended to retreat as gracefully as possible from her threat of war. (The Mexican records have never been examined.) Moreover, there was the question of boundary dispute between Texas (now the United States) and Mexico — a question which Dr. Reeves seems to regard as negligible. Even in the light of Dr. Reeves's examination of the records, the situation seems to be summed up thus: Polk, greatly desiring California, prepared for war by the mobilization of troops and stood ready to strike upon slight provocation; Mexico, incensed by the annexation of Texas, assumed a similar, if not more bellicose, attitude and mobilized her troops upon the border. Mexico gave the provocation when General Ampudia crossed the Rio Grande and engaged General Taylor upon soil claimed by the United States. Upon the strength of this act of aggression American historians have justified the defensive character of the war. (Burgess, *Middle Period*, 331.) In the face of these facts it seems difficult to concede to Dr. Reeves that the Mexican war was not, to some extent at least, the result of Texas annexation. Nor does he fortify with any sufficient evidence his statement that "before the news of Taylor's fight reached him Polk had determined to declare war upon Mexico." It seems doubtful, to say the least, whether he is justified in concluding that the Mexican war must stand in the light of a premeditated aggression for conquest and spoliation completely separated from the incident of Texas annexation.

In at least one instance Dr. Reeves has slipped into a minor error that is somewhat glaring. He characterizes President Polk's appointment, without the consent of the Senate, of Nicholas P. Trist as special agent to negotiate with Mexico for peace as "a method quite without precedent or parallel." As a matter of fact, this power of appointing special agents without the consent of the Senate has been exercised from time to time by many Presidents from the very first year of our constitutional history. (Moore, *Int. Law Digest*, IV, 452-457.)

In spite of these criticisms Dr. Reeves has given us a preeminently scholarly treatment of a period of our history every detail of which has been tangled and knotted with, or completely obliterated by, the slavery controversy. It is perhaps to be regretted that, in the labyrinth of detailed diplomatic correspondence and negotiation which is set forth, the larger principles which shaped and impelled these great expansive movements of our history have been somewhat obscured, while interesting sidelights upon characters and events stand conspicuously forward. The examination of manuscript and printed records seems to have been carefully and exhaustively made, and the work, in consequence, can not fail to be stimulating, helpful, and suggestive to the student of American diplomatic and political history.

HOWARD LEE MCBAIN.

The Two Hague Conferences and their Contributions to International Law. By William I. Hull. Ginn & Co.: Boston. 1908.

The purpose of this volume is stated in the preface to be for service to the members of the National Educational Association, and other organizations named, in carrying out the recommendation of a report adopted by the association, that "the work of the Hague conferences and of the peace associations be studied carefully, and the results given proper consideration in the work of instruction." In accordance with this announced purpose the author, in presenting the labor and results of the conferences of 1899 and 1907, has marshaled his material in a unique and attractive way. Dividing his subject into thirteen general topics, such as "Origin," "Members," "Armaments," "Warfare on land," "Arbitration," etc., he treats each topic under two sub-heads, "The Conference of 1899" and "The Conference of 1907," summarizing the discussions and accomplishments of each conference as to the topic which he is considering. It is evident that this method of presentation fur-

nishes a ready means of comparing the results of the two conferences as to any subject in which a reader is peculiarly interested; and it further illustrates in a graphic manner the progress made by the nations toward the amelioration of the brutality of war and the elimination of its causes by demonstrating the decided advance made by the conference of 1907 over that of 1899, both in the spirit manifested and in the character of the discussions.

The first eight divisions (which are chapters in fact, though not so termed) deal with the origin and organization of the conferences (pages 1-51) except V, which is entitled "Organized public opinion," and the five divisions following (pages 52-448), with the subjects considered by the delegates. The remaining fifty-five pages (division XIV) are devoted to "A summary of results and their historical importance," and this the author divides into three parts, entitled "Attempts," "Achievements," and "Indirect results." In the first two parts he treats in a brief way of what was *attempted* by the conferences of 1899 and 1907, and of what was *achieved* by them. It is a resummarizing of the material already dealt with upon the basis of the conferences rather than the subjects. In the part entitled "Indirect results" are discussed "The federation of the world" and "The Third Peace Conference." The "historical importance" of the two conferences, which the author purports to discuss, seems, upon an examination of the text, to hardly warrant its inclusion in the title of this portion of the work.

The discussion of "Organized public opinion" (part V) in the volume may be fairly criticized, as introducing a subject pertaining to the individual members of the conferences rather than to them in their official capacity. The extent of the influences exerted by societies, associations, and organizations of various sorts being largely problematical, reference to them in a precise treatise, such as Professor Hull has published, weakens rather than strengthens his work. In a measure the same is true of the section entitled "The federation of the world." It deals with a phase of political development which, under certain conditions, might be directly related to an international conference such as those held at The Hague, but which is, so far as the two already held are concerned, irrelevant. That the peace conferences have to an appreciable degree supplied the lack of an efficient executive to enforce the recognized law of nations and the decrees of international tribunals, as asserted by the author, certainly requires more than a declaration to be generally accepted. The aroused conscience of civilized states and the

constantly increasing force of moral obligation can never form substitutes for an executive and the physical might upon which its authority rests. To accept such a doctrine takes us back to the idealism of Locke and Montesquieu.

As a whole, Professor Hull's book is of decided merit. The style is simple and direct. The digest of addresses is well done, and the quotations given have been well selected. The amount of space given to the various subjects is commensurate with their importance. These subjects are also well arranged for reference, and the volume will be unquestionably useful to students of world politics and to instructors in presenting to their pupils the progress which has been made by the nations toward the removal of the causes and horrors of war. The index might be improved. The analytical treatment, preciseness of statement, and practical style further commend the book to the general reader, as well as to the student of political subjects.

ROBERT LANSING.

Verfassung und Verwaltungsorganisation der Städte. 7. Bd. England-Frankreich-Nordamerika. Mit Beiträgen von F. W. Hirst, H. Berthélemy, Frank J. Goodnow, Delos F. Wilcox. Im Auftrag des Vereins für Socialpolitik herausgegeben. Leipzig: Duncker & Humblot. 1908. Pp. xvii, 227, 229.

This is the final volume of a survey of municipal organization undertaken by the *Verein für Socialpolitik*. The first three volumes were devoted to Prussia; the fourth, to several of the smaller German States; the fifth, to Switzerland; and the sixth to Austria. The seventh volume is devoted to brief accounts of the municipal organization in England, France, and the United States. The portion of this volume dealing with France is printed in French, and the parts devoted to England and the United States are printed in English. The proof-reading has been carelessly done, and, as might have been expected, the German printers have made numerous small errors in the English and French texts. There is, however, prefixed to the volume an elaborate table of corrections to the parts written by Prof. Goodnow and Dr. Wilcox.

The account of English municipal government consists of a brief discussion concerning the general municipal organization in England, and of separate discussions of the governments of the cities of London and Leeds. This portion of the book is done by the competent hand of

Mr. F. W. Hirst, and furnishes perhaps the best brief discussion of English municipal government at the present time.

The discussion of French municipal institutions has been entrusted to M. Henry Berthélemy, the well-known authority on administrative law. In the brief space of seventy-five pages M. Berthélemy gives an excellent account of the French municipal government. It is to be regretted that he did not include a discussion of the government of Paris; his treatment of this city is confined to a few brief passages in which he indicates the manner in which its organization differs from that of other French cities. M. Berthélemy's opinion regarding the political character of the *conseils municipaux* is of interest:

La grande majorité des électeurs des villes est constituée par la population ouvrière. Dirigés par des comités de politiciens qui ont en vue bien moins les intérêts de la cité que la satisfaction d'ambitions personnelles, les ouvriers sont facilement dupes des intrigants ou des agitateurs sans scrupules. Les grandes villes françaises sont pour la plupart administrées par des assemblées composées en majorité de gens au dessous de la tâche qu'ils assument, et parfois même d'une moralité douteuse. (p. 170.)

In the part of the volume devoted to the United States Prof. Frank J. Goodnow contributes an excellent brief account of the position and powers of cities in the United States, and Dr. Delos F. Wilcox discusses briefly the municipal governments of Washington, New York, Chicago, Philadelphia, St. Louis, Boston, Baltimore, Cleveland, San Francisco, and New Orleans.

It is somewhat difficult to determine to what audience the volume under review is addressed. The series as a whole is evidently intended for German readers, but the accounts here printed are available only to those who read English and French, and in these languages there are more exhaustive and more satisfactory accounts of municipal organization than are here given. The general discussions of English, French, and American municipal institutions, by Hirst, Berthélemy, and Goodnow, while excellent, are too brief to be of much value to anyone not already possessing some knowledge of municipal administration. Dr. Wilcox's work on the government of great American cities is the only new matter in the volume, and while it shows defects incident to the task of brief summarization, seems well worth being issued in a form more available to American readers.

W. F. DODD.

Texts of the Peace Conferences at The Hague. By James Brown Scott, editor. Boston: Ginn & Co. 1908.

Under this title is presented a work of 410 pages, containing the texts of both of the Hague conferences, together with tables showing the signatures, adhesions, and reservations made by the nations of the world to the various conventions and acts. The last 70 pages are taken up with an appendix containing such related conventions and documents as the various Geneva conventions, instructions to the armies of the United States, the Brussels project for laws of war, the declarations of Paris and St. Petersburg, the Oxford Manual, and the convention of 1904 regarding hospital ships. The book is furnished with a 30-page "index-digest" which should prove convenient in searching for the various references in conventional international law to any given doctrine.

The work is prefaced by a brief note from Mr. Elihu Root, Secretary of State, the keynote of which is that "The question about each international conference is not merely what it has accomplished, but also what it has begun, and what it has moved forward."

The preface is followed by an introduction by the editor dealing with the growth of the conference idea, and especially with the work of the two Hague conferences. This necessary historical background is briefly set forth to aid the student in his use of the texts.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

(For table of abbreviations used, see Chronicle of International Events, p. 195.)

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SUPPLEMENT — IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER.

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LATIN AMERICA AND INTERNATIONAL LAW

The entry of Latin America into the community of nations is one of the most important facts in the history of civilization. It resulted not only in widening the field occupied by International Law but also in radically modifying its character. Although the Latin States of America inherited the civilization of the peoples of Europe, they developed along different lines. In number, and in the fact of their common origin they were like the members of one large family who had been suddenly and almost simultaneously called into independent life.

This combination of circumstances caused these nations, upon their appearance in the general society of states, to exclude from their constitutions the principles of European public law which did not harmonize with the special character of their organization; and to reject, in their foreign relations, those principles and practices that were incompatible with their independent position or that did not favor their special conditions of development.

In this new community of states, problems of International Law *sui generis* and problems distinctively American arose and thus made possible the uniform regulation of matters of special interest and even in some cases of matters of universal interest regarding which a general world consensus of opinion had not yet been formed. Furthermore, this new society of states proclaimed principles which could only with great difficulty be brought forth from their hiding-place in an isolated convention or the usage of some European state.

To show in what manner, and up to what point, the Latin nations of America contributed to the development of the Law of Nations is the task set before us in this article, a work which, in spite of its importance, has not yet been undertaken by any of the publicists of Europe or America.¹

¹ Every day, however, greater interest is being displayed in this continent in the investigation of that subject, as is shown by two very significant facts. The first is the initiative taken by the "American Academy of Political and Social

those ethnical elements upon a soil distinguished by so many peculiarities, is completely *sui generis*; in it the whites, born in the mother country, although in the minority, exercised the control and guided a multitude which was in great part illiterate and ignorant.

The creole element, the only thinking part of the population, felt the injustice with which the mother country treated its colonies. The "élite" of this class, instructed by travel and the perusal of the philosophical writings of the eighteenth century, took advantage of the embarrassing position in which Spain found herself because of the Napoleonic wars, and followed the example of the United States, dragging the entire creole element into a movement of emancipation.²

In the struggle for freedom, the Spanish-American colonies looked upon one another as brothers and gave military aid to one another in this common cause, in spite of the enormous distances which separated them.³

Upon gaining their independence, they were exposed to the influence of both the United States and Europe. From the example of the United States, the Spanish-American statesmen perceived that the emancipation must be essentially political, not social, the sole aim being to break the bond of subjection that bound the colonies to the mother country. It was the realization of this fact that made them see that it was only in the public law that they could and should build entirely anew, following in this the political insti-

² It is not worthy of study, whether the colonies of Spanish-America were prepared or not for independent life; whether or not the idea of independence was diffused through the entire mass of the population; whether they had any exact notion of what they proposed to bring about; in short, whether the movement of emancipation was due to a national sentiment duly matured or was merely a fulfillment of one of the laws of historical psychology, — that a people will take advantage of the difficult situation of another people in order to exercise against that other any rights to which it believes itself to be entitled, — or was, as we ourselves believe, due to a combination of the two.

³ Brazil secured its independence in 1822, preserving the monarchical form of government, forming therefore and because of difference of origin, a nation that did not closely unite with the republics of Spanish America. Because of its form of government, its greater population, the extension and richness of its territory, Brazil was better known to the European countries and held by them in greater esteem than the other Latin-American countries.

tutions of the United States as being those most suited to nations recently freed from the yoke of the mother country.⁴

They organized their respective countries uniformly, subjecting them to a constitutional regimen whose principles and forms were republican, liberal and democratic. And this uniformity of views is so much the more worthy of note because in proceeding thus uniformly the statesmen of these new nations did so spontaneously and without any previous agreement of any kind whatsoever and in spite of the formidable reaction against those principles which at that time was being felt, above all in France.

This sudden political change, for which Latin America, because of its education, was not prepared, brought as an almost inevitable consequence civil wars, dictatorships and constant modifications of the fundamental ordinances of those countries in the first period of their independence.

Although the new states experienced all these changes in their public law, in other matters they were exposed to the direct influence of Europe, as they were of the same civilization and connected with the Old World by powerful bonds of culture and commerce. But none of the European nations exercised a greater influence over them than France, which, through the expansive force of its ideas and institutions, even came to serve as their model in private law.

Thus the former Spanish colonies of America were born simultaneously into political life, forming a family of states in which the pride of independence, the love of liberty and the spirit of fraternity, developed an implacable hatred towards all foreign domination, and an eager striving for the formation of a political entity which would protect them against all attacks on their sovereignty and maintain peace among themselves.

These aspirations and this hatred, manifestations of one and the same psychological law, and necessary products of the factors and the influences we have just noted, are the source out of which

⁴ It is to be noted that these institutions of the United States were known in Latin-America principally through the intermedium of the French constitution of 1791 and the Spanish constitution of 1812, both of which derived their inspiration from the constitution of the United States of 1787 and from the writing of the French philosophers of the eighteenth century.

sprang the whole life and evolution of the Latin-American peoples in this fundamental period of their history, and explain the attitude naturally assumed by them in the international community of nations.

II

In the New World existed the Latin group and the Anglo-Saxon. These two, despite their very great dissimilarities, had certain common interests which served as bonds between them. They differed in religion, language, usages and customs; and although the Anglo-Saxon furnished to the Latin the model of its institutions, it was not fitted to provide those other elements of life and culture necessary for prosperity: literature, commerce, capital and population. This caused between the two a separation so marked that they came to know each other only through the intermedium of European literature. From the French literature the Latin Americans gained their knowledge of the United States, and they in turn were known in the United States through the literature of England. But in spite of this, the circumstances of the emancipation, the similarity of their political institutions, and their geographical situation, created between them a feeling of continental solidarity, but only in so far as concerned the independence of all the States of the New World from their respective mother countries.

The movement of emancipation of the Spanish-American States (April, 1810–December, 1824) and that of the United States, were proceedings without precedent in the international relations of Europe and greatly alarmed the governments of that continent.⁵ These powers looked upon the action of the colonists as civil war, as an attack on the integrity of the mother country. The colonies of America, on the other hand, maintained that such an act was the legitimate exercise of a right, the logical consequence of indi-

⁵ In the diplomatic history of Europe there is a case which is very analogous to that of the emancipation of the American colonies. Reference is made to the revolt, at the end of the Sixteenth Century, of the provinces of the Low Countries against Spain, from which they depended; and the reunion of the seven provinces of the North in a "Perpetual Confederation" which declared its independence from Spain in 1581 and adopted the republican form of government. Spain recognized the independence of these provinces almost a century afterwards, in the treaty of Münster of 1648.

vidual liberty, by virtue of which they could form themselves into sovereign states. They maintained, therefore, that it was not a question of a civil struggle but of international war.

Further, they would not admit the possibility of a future return to the condition of their former dependence on the mother country; nor would they agree to the extension to the new continent of that policy of the balance of power and of intervention which was at that time the foundation of the international politics of the Old World; nor would they tolerate the idea that the States of Europe might acquire any part of the American continent, however unexplored it might be, that is to say, regions "nullius" according to the then dominant doctrines of law.

The states of the New Continent, therefore, insisted upon their independence, liberty and equality; and maintained that America, in view of the circumstances attending its birth into political life, should not be absorbed by Europe but should be left free to follow the path of evolution most in keeping with its destinies.

These ideas, which were held by statesmen of the United States from the end of the eighteenth century, and by some Latin-American thinkers from the beginning of the nineteenth century, found exact expression in the message of President Monroe in 1823. While this message did not have the object of making any immediate declaration of principles, still it expressed so clearly the situation of the New World with respect to the Old, and contained such an accurate synthetic statement of the aspirations and destinies of America as to become its political gospel. And the tacit acceptance by Europe of the declarations of this document, together with the decided determination of the Latin-American states to maintain them, made possible the final entry of an "American Continent" into the community of nations.

Upon entering thus into that community, the states of America fixed for all time the cardinal points of their foreign policy in those same principles, in opposition to the principles then dominating in Europe. In this manner, they not only contributed with new principles to the development of International Law, but also laid the basis of that which may be called "American" International Law.

III

In regard to the reciprocal relations of the Spanish-American nations, their statesmen, and especially those of Chile in 1810,⁶ believed in the necessity of a confederation of the peoples of Spanish origin, which, while respecting the autonomy of each state, would not only protect them against the attacks of European countries, but also fix the course of domestic and foreign politics, harmonize their interests and obviate or settle all conflicts between them.

Thus at the beginning of their independence, they inaugurated a policy of fraternity which presented a remarkable contrast to that of rivalry and passion then characteristic of the international life of Europe.

This idea of confederation, which in the breadth of views shown has few precedents in the modern history of human thought and none in European diplomacy, dominated with more or less intensity this entire first period. And the statesmen of the day believed that the best method of putting it into practice was through the convening of congresses in which all the Spanish-American states should be represented.

It is indispensable to give an outline of the various congresses held during this period and of the pacts subscribed in them even

⁶ In the project of the "Declaration of the Rights of the People of Chile" of 1810, (modified in 1811), the following principles are proclaimed which do honor to the clear-sightedness with which the statesmen of Chile discerned the future destinies of America: *First*, The peoples of Latin-America can not, isolated, defend their sovereignty; in order to develop, they must become united, not for reasons of domestic policy, but for security abroad, against the projects of Europe and to avoid wars among themselves. *Second*, This does not at all mean that the States of Europe should be regarded as enemies; on the contrary, it is indispensable to form, as far as possible, closer relations of friendship with them. *Third*, The nations of America should meet in a Congress for the purpose of organizing and strengthening themselves (On this last point, the Declaration states that "the day when America united in a Congress, whether of the Nation or of its two continents or of the South, speaks to the rest of the Earth, its word will be respected and its resolutions contradicted with difficulty").

This was not the only time when ideas of this character were expressed by statesmen of Chile. In the proclamation addressed to the Chilean people by the Supreme Director O'Higgins, dated the 6th of May, 1818, mention is made of "the great confederacy of the American Continent, capable of maintaining its political and civil liberty."

though they were not ratified. Such an outline will clearly show the international necessities and aspirations of these countries and the measures they judged to be most fitted to satisfy them; the character of the people and their international tendencies; up to what point they desired and could initiate a policy of an international character which was at times distinctively American.

Furthermore, the conventions therein subscribed exercised a considerable moral and political influence, as they kept alive the idea of Latin-American solidarity, forming and directing public opinion, while at the same time they furnished the model in many points for the agreements celebrated by these states with each other and with European countries.

Since 1822, Bolivar, the great liberator, at that time President of Columbia, had labored to bring about a confederation of the Spanish-American countries, planning for that purpose, a Congress which would meet in Panama. By way of preparation, he negotiated treaties of "Union, Alliance and Confederation" with several countries. Those treaties and the projected congress, it is worthy of comment, bore a character which was entirely different from acts apparently analogous celebrated at the time in Europe, such as the Treaty of the Quadruple Alliance of Chaumont in 1814, the Treaty of Paris of the 30th of May of the same year, the Congress of Vienna of 1815 and other congresses of that epoch.

The congress planned by Bolivar met in Panama in 1826. Representatives from only Mexico, Central America, Columbia and Peru were present, and ten sessions were held, between the 22nd of June and the 15th of July of the same year; and in them, the matter of the mediation of Great Britain for the purpose of obtaining peace between Latin-America and Spain was discussed, without, however, any agreement being reached thereon.

In that congress, a pact of "Union, Alliance and Perpetual Confederation" was subscribed, two others on Contingents of Army and Navy, and another on the transfer of the American Assembly to Mexico (Tacubaya).

The object of the first pact was to maintain defensively and offensively, if necessary, the sovereignty, independence and territorial integrity of all and each of the Confederated Republics of America,

against all foreign domination (articles 2, 3, and 21) while, as a consequence, prohibiting any one of them from making peace with the enemies of their independence without specifically including all the allies (article 10). The manner in which the confederates should in case of necessity give their aid on land or sea was minutely regulated (articles 4 to 10). In order to avoid difficulties among themselves, especially in the matter of the delimitation of boundaries, it was agreed that as soon as the respective boundaries had been marked and fixed in accordance with special conventions to be celebrated by the interested states, these boundaries should be guaranteed by and placed under the protection of the Confederation (article 22).

In order to make the confederation efficient and stable, the parties agreed to constitute every two years a "General Assembly" to which each party would send two ministers plenipotentiary. One of the objects of this Assembly was, among others, to

contribute toward the maintenance of unalterable peace and friendship between the confederated powers, serving them as adviser in great conflicts, as a point of contact in time of common peril, as a faithful interpreter of the treaties and public conventions celebrated therein, whenever any doubt may occur as to their meaning, and as peacemaker in their disputes and differences;

as well as to

labor for conciliation and mediation between the allied powers or between one or more of these and one or more of the powers foreign to the Confederation (article 13).

The contracting parties bind themselves and solemnly promise to compromise amicably between themselves all differences which to-day exist or may exist between any of them; and, in case the disagreements between the powers are not terminated, then, prior to any act of violence, they will be referred to the judgement of the Assembly, and the decision rendered shall not bind the powers if said powers shall not have agreed beforehand that it should so bind them (article 16).

None of the parties may declare war against another without publishing previously a detailed account of the matters leading up to the conciliatory decision of the General Assembly, under penalty of being excluded from the Confederacy (articles 16 and 19).

None of the confederates may declare war against a country foreign to the Confederation without having previously requested the good offices of the Confederation (article 18).

In addition to the bonds created between the allies, certain norms were established according to which they should conduct their foreign policy, and which had an exceedingly unusual character, especially in that epoch. These were: considerable restrictions on the freedom of the confederates to change their form of government, as well as to celebrate alliances with powers foreign to the Confederation (articles 14, 18, and 29); the citizens of any of them, might, without any other requirement than a manifestation of the will, obtain naturalization in the territory of the other confederates, and, even without becoming naturalized might have the same rights as nationals (articles 23 and 24); the slave trade was prohibited (article 27); finally, in a supplementary article, the idea of the codification of International Law was expressed. In this article it is declared that the confederates, desiring to live in peace with all the nations of the universe agree that as soon as the treaty of Confederation is ratified,

they will proceed to fix in common accord all those points, rules and principles which must serve as a guide to their conduct in both cases [peace and war], for which purpose they will again invite neutral and friendly powers to take an active part in such negotiations, if they deem it convenient, and to participate, through their Plenipotentiaries, in the drafting, concluding and signing of the treaty or treaties which may be entered into with such an important object in view.⁷

The treaty was to remain in force during the war of independence, and once peace had been declared, it was to be revised in the Assembly of Plenipotentiaries (article 30); and any of the states of America which had not signed it might adhere to it (article 26).

The resolutions of the Congress of Panama were not ratified; only Columbia ratified the Pact of Union.

This congress undoubtedly did not pass unobserved either by the United States (which, invited to participate, sent representatives who did not arrive in time to take part in the Assembly), nor by

⁷ This article was due to the initiative of the Peruvian Plenipotentiary, who, in article 16 of his draft of a treaty of confederation, presented to the Congress of Panama, provided that "two individuals will take it upon themselves to present in the coming year a draft of an American Code of Nations which will not be contrary to European customs."

Europe, where in some countries, especially in France, it gave rise to considerable anxiety.⁸

Several years afterwards, and on several occasions (in 1831, 1838 and 1840), Mexico took the initiative in calling together a new Spanish-American congress. Many of the countries receiving the invitation, accepted with enthusiasm, but the congress never met. The object of the projected congress was similar to that of the Congress of Panama, but more practicable. An attempt was to be made in it to effect a union of all the republics of Latin America for the purpose of defending themselves against foreign aggression; to secure the mediation of neutrals in case of differences between any of the sister republics; and finally, to draft a Code of Public International Law.

In 1846 and 1847, the Latin-American states believed their existence to be threatened by the expedition which the Ecuadorian General Flores was preparing in Spain with the expressed purpose of recovering the government of Ecuador of which he had been deprived. The Spanish-American states had well grounded motives for the belief that the real object of the expedition was to create in America a monarchy over which a Spanish prince would be placed. According to some, the states that would comprise the monarchy would be New Granada, Ecuador, Venezuela, Peru and Bolivia; according to others, it would be composed of only Ecuador, Peru and Bolivia. Public opinion in the Spanish-American countries was aroused and the governments echoing the general indignation, discussed the affair and made arrangements to resist the expedition at whatever point it might arrive. At the same time it was believed that the most opportune measure was the convening of an American Assembly to consider the matter.⁹

The congress met in Lima, and was participated in by the states which believed themselves most directly threatened by Spain: New Granada, Ecuador, Peru, Bolivia and Chile. The congresses held twenty sessions between the 11th of December of 1847 and the

⁸ As to the importance given to it by the United States, *vide*, Moore: "A Digest of International Law," (Washington, 1906), Vol. VII, page 940.

⁹ The expedition planned went to pieces early in 1847.

1st of March of 1848. On the 8th of February, 1848, two treaties were signed: one of "Confederation" and the other of "Commerce," and also two conventions, one consular and the other postal.

The treaty of "Confederation" in its preamble states that the Spanish-American republics, which are

bound together by origin, language, religion and customs, by geographical position, by the common cause they have defended, and by the analogy of their institutions, and, above all, by common necessity and reciprocal interests, cannot be considered but as parts of the same nation, which should unite their forces and resources to remove all the obstacles opposing the destiny offered them by nature and civilization.

The object of the pact was not only to unite the signatory powers for the purpose of repelling any attack on their independence or territorial integrity, but also to ward off any attempt to alter their political institutions or to do injury to the states. Articles 1 and 2, referring to this matter, have closely followed, and completed, the declarations contained in the Monroe Doctrine on the same point. The pact further proposed to prevent conflicts between the confederates, especially those arising out of boundary disputes, establishing for this purpose that, in default of special stipulations between the interested parties, the boundaries should be those possessed by the respective countries in the epoch of the conquest of independence from Spain, and further providing rules for their demarcation (article 7). It was likewise established, with the same object, that none of the confederates should interfere in the internal affairs of another, nor should permit preparations to be made in its territory to disturb the internal peace of any of the others (articles 12 and 13). In order to maintain the bond between all these countries, it was agreed that there should be a "Congress of the Confederation," made up of a plenipotentiary from each state, which should meet periodically.

Without materially restricting the sovereignty of the individual states, this assembly had, however, important powers, especially for restoring harmony and preventing or resolving the conflicts of the allies either among themselves or with foreign countries (articles 3 and 4, and 18 to 23). When questions arose between the allies, they were to be decided pacifically, and, in case of necessity, the

government of each one of the republics should offer its mediation, and labor to have the matter submitted to arbitration. And if that mediation be fruitless and arbitration be rejected, "then the Congress of the plenipotentiaries, after examining the grounds upon which each of the Republics bases its contention, will give the decision it deems most just;" and if one of the allies should refuse to conform to the findings in the matter or refuse to carry out the decision of the congress, the other allied republics were to consider themselves relieved of all their obligations toward that ally, without prejudice of the other measures which they might see fit to adopt in order to carry out the decision (articles 9 to 12). This pact further carefully regulated the juristic situation created between the belligerent state and the confederates in the case of a war breaking out with a foreign country, as well as the manner in which each one should furnish its military contingent in such a case (articles 5 and 6, and 15 to 18). It also contained very important provisions as to the foreign policy of these countries, which was declared in article 8 in the following terms:

If an attempt should be made to unite two or more of the confederated Republics in a single State, or divide into several States any of said Republics, or to separate one or more ports, cities or provinces, from any of them to unite with another or with a foreign power, it will be necessary, in order to make such a change effective, that the Governments of the other confederated Republics shall expressly declare, either directly or by their plenipotentiaries in the Congress, that such a change is not prejudicial to the interests and security of the Confederation.

Extradition for political offenses was not approved (article 14).

This treaty of confederation had no fixed term of years in which to run, and it was to be submitted to all the governments of America without exception and their adherence to it solicited.

It is worthy of note, that this pact which established international norms of such great importance, did not make any provision as to the codification of international law, as was done in the Congress of Panama, in spite of the fact that the instructions of the Peruvian Government to its delegates to the Congress of Lima emphasized the advisability of such a codification as the best method of arriving at a knowledge of the reciprocal rights and duties of the states.

In the Treaty of Commerce signed in that same Congress, it was determined that the citizens of any of the confederate countries should have, in the territory of the others, the same rights as the citizens of the latter, that is, perfect freedom of person and property. Provision was also made for the free navigation of the international rivers of America, but only for the riparian republics or those whose territory was traversed by the river (article 8). Certain principles of maritime law were also proclaimed: the abolition of privateering among the confederates; that the neutral flag covers enemy's goods excepting contraband of war; that blockades are not binding except when effective; that the sacking of the cities and places of the enemy is prohibited even when taken by assault; and that the slave trade is forever abolished, those participating in it to be treated as pirates.

The "Consular Convention" fixed in detail the duties of the consuls, their obligations and prerogatives, without giving them a diplomatic character or diplomatic immunities, but only certain privileges intended to protect them in the free exercise of their functions.

With the exception of the Consular Convention, which was accepted by New Granada, the conventions signed in this congress as well as those originating in Panama, were not ratified by the respective governments.

The war of the United States with Mexico in 1848 and the filibustering expeditions organized in the United States by Walker against Central America, awakened a feeling of distrust in some of the states of Latin America. These circumstances, coupled with the desire to enter into closer relations of friendship, gave rise to a pact known as "A Treaty of Union of the American States," which was signed by the representatives of Chile, Peru, and Ecuador on the 15th of September, 1858, in Santiago. This example was imitated on November 9th of the same year by Mexico, Guatemala, Salvador, Costa Rica, New Granada, Venezuela, and Peru, who, in Washington, entered into a treaty of alliance and confederation which was very similar to the one subscribed in Santiago.

While several of the principles enunciated in former conventions, such as ample civil equality and complete commercial liberty for the citizens of the interested parties (articles 1 and 4), extradition except for political offenses (article 6), and principles of law of maritime warfare, were proclaimed in this treaty of the 15th of September, others were brought forward in the interest of the formation of closer friendly relations between the contracting countries. Among these last were the agreements to recognize professional titles under certain conditions (article 8), to recognize judicially the documents, judgments, and testimony given and accepted in the courts of the territory of any of the other states (article 5), and an expression as to the general utility of adopting a uniform system of money, weights and measures as well as of harmonizing as far as possible the customs laws and duties through the celebration at the proper moment of conventions for the purpose (article 9). It was further recommended that energetic measures be taken to prevent the organization in any of the allied countries of expeditions directed against the legal order of any other of those countries. Revolutionists coming armed from abroad were to be treated as pirates (articles 14 to 18). In article 13 it was stipulated that

each one of the contracting parties binds itself not to cede nor to alienate to another State, under any form, any part of its territory, nor to permit any nationality foreign to that dominating to establish itself within its boundaries, and promises not to recognize in this character any that may be established under any conditions. This provision will not stand in the way of any cession that may be made by the interested States for the purpose of regulating their geographical boundaries or in fixing their natural limits or in determining with mutual advantage their frontiers.

As a method of obviating wars between the parties, the same mode of procedure was agreed upon as that contained in the treaties of peace and friendship celebrated between these countries and the United States (article 19). In order to consolidate and strengthen the union between them and for the better realization of the object of the treaty, it was provided that a congress of the states should meet at least every three years, composed of one plenipotentiary from each country; this congress to act as mediator in case of disagreements arising between any of the contracting parties, and no one of the

states to be permitted to reject the offer of mediation (articles 20 and 21). This treaty was to run for ten years, a period which might be extended; and it was stated that any of the states of Latin America might adhere to it (articles 23 to 26).

The treaty of continental union subscribed in Santiago was accepted by Guatemala, Salvador, Costa Rica, and Mexico. The Argentine Republic, in an official note of the 10th of November, 1862, refused to support this treaty, on the grounds that it believed the document to contain principles that were either already comprehended in the Law of Nations universally accepted, or in opposition of International Law. The government of Argentina particularly objected to the provisions of article 13, which, it held, imposed a limitation upon the sovereignty of the nation.

Again, in 1865, the old idea of confederation came to the fore in the arena of South American politics. The direct cause of this was the feeling of uneasiness growing out of the fact of the re-incorporation of Santo Domingo into the Spanish monarchy in 1861, the French intervention in Mexico in 1862 with the effort to found a throne upon the ruins of the republic, the plans of reconquest ascribed to Spain through its attempt in 1864 to occupy the Chincha Islands belonging to Peru, and the imperialistic tendencies of the foreign policy of the United States, which the new Republics looked upon as a menace to their independence. It was in 1864 that Peru extended an invitation to the Spanish-American States of America to meet in a congress. Its purpose was not to frame anti-European resolutions: it was dominated by the desire of all the states to become more intimately acquainted with each other with the special idea of making better known their resources and means of defense. It aimed further at the adoption of principles that might put an end to boundary disputes and forever abolish war, substituting therefor arbitration as the only method of settling difficulties between them.

Enthusiastic response was given to the call by the Latin-American states, and Chile proposed that the United States and the Brazilian Empire be also invited.

The congress met in Lima on the 15th of November, 1864, and was attended by delegates from Chile, Salvador, Venezuela, Colombia,

Ecuador, Peru, and Bolivia. A delegate from Argentine Republic was also present, but his credentials did not empower him to subscribe the agreements that might be entered into at the congress.

During the sessions of this body, the conflict of Peru with Spain on the subject of the possession of the Chinchas Islands broke out, and the attention of the delegates became absorbed in the effort to arrive at the best method of deciding this question honorably and pacifically. The Peruvian government more than once during this period turned to this assembly in search of its opinion and advice in the matter of the relations with Spain.

In spite of the variety of subjects embraced in the programme of invitation, the Congress voted, for the above reason, only two pacts, both of the 23d of January, 1865: one of these was entitled "Union and Defensive Alliance," and the other "Preservation of Peace."

In the first of these conventions, the parties form an alliance to defend together their independence, sovereignty, and territorial integrity against all aggressions, whether of foreign powers, of those signing the pact, or on the part of foreign forces that are directed by no recognized government (article 1). This alliance would become operative not only upon an attempt being made to deprive a nation of a part of its territory or to change its form of government or its internal constitution, but, also, should an effort be made to "bring any of the High Contracting Parties under a Protectorate or force it to sell or cede territory or to establish upon it any privilege, right or preference which may lessen or impair the free and complete exercise of its sovereignty and independence" (article 2). The parties promise likewise not to grant or recognize any protectorate or superior rights which affect their sovereignty and independence, and "not to alienate to another nation or government any part of their territory. This stipulation, however, does not prevent those parties possessing contiguous territory from making cessions which may be intended to fix better their limits or frontiers" (article 9). Finally, it is agreed to hold an international conference every three years (article 10).

In the treaty on "Preservation of Peace," the parties bind themselves to use pacific measures exclusively to put an end to all their

differences, including those arising out of the question of boundaries, submitting them to the final decision of an arbiter when they can not be settled in another fashion (articles 1, 2, and 3). If any of the parties should decline to submit the matter to arbitration, the allies are to proffer their good offices in order to influence the hesitating power to fulfill its obligations (article 4). Finally, provisions similar to those contained in the pacts of confederation, are drawn up in order to prevent the gathering of elements of war or the recruiting of men in the territory of one power for the purpose of hostile operations against any of the other signatory powers, and to stop those who may have fled from one country in search of an asylum in another from conspiring against the government of the state they left (articles 6 and 7).

In the study of these pacts, one pauses before the already cited articles 2 and 9 of the Treaty of Alliance, which make such a strenuous effort to secure forever the independence, liberty, and territorial integrity of all of the signatory powers as to deny them the right to relinquish voluntarily any of those attributes of sovereignty. We have noticed an analogous disposition in Article 13 of the Treaty of Union subscribed in Santiago in 1856.¹⁰

These conventions signed in Lima were not generally ratified by the signatory governments.¹¹

IV

After the separate analysis of the congresses and pacts of confederation of the Latin-American states since 1826, it is important to proceed to an examination of them as a whole in order to learn what are their characteristic features and the results to which they have attained.

¹⁰ The above cited articles 2 and 9 were undoubtedly children of the dread that Argentine, Uruguay, and Brazil, at the time at war with Paraguay, should dismember this country.

¹¹ On the 16th of May, 1867, the delegates of Chile, Ecuador, and Bolivia, in Lima, entered into a treaty upon principles of International Law, and, on the 3rd of October of the same year, the representatives of Chile, Peru, and Bolivia drew up a treaty almost identical to the above. These pacts, which were not ratified, contain provisions analogous to the conventions of "Union and Confederation" of 1848, 1856, and 1865.

The idea of confederation pursued by all of them was dominant not only in the minds of the statesmen but also in the public opinion of the period. It varied in intensity according to place and time. In fact, this tendency was stronger in the south than in the north of the continent; and in the southern portion, the confederation idea found readier support in the republics of the Pacific coast than in those of the Atlantic. The latter, because of their proximity to Europe and their location on the great fluvial route of the River Plate, had certain special interests which were even antagonistic to those of their sister republics and which did not permit the above idea to find favor with them. Moreover, this aspiration was most intensely manifested in times of danger and for that reason had always a passionate and lyric character. This circumstance, united to the philosophical education of the Latin mind and the facility which their independence gave them to lay down new rules in this matter as in Constitutional Law, brought about that the resolutions of these congresses on the subject of confederation were conceived in a strain altogether too idealistic and Utopian. This, or a similar reason, was urged by some of the governments for not ratifying the pacts we have mentioned.

But, on the other hand, even though ratified, these agreements could not have accomplished their purpose, because of several difficulties which stood in the way of a confederation. How, indeed, were these states to overcome the obstacle of the enormous distances which separated them, the absolute lack of intercommunication, the highly developed spirit of national independence, the bad blood engendered by the boundary disputes, the conflicts over the navigation of rivers, the baneful influences of civil wars due to the personal ambitions of revolutionary leaders, the lack of preparation of the peoples for political life and the want of common traditions?

However, if these pacts and congresses did not lead to the long dreamed of confederation, they nevertheless were not barren of important results. They exercised an important moral influence, as they not only kept alive the feeling of solidarity between the states of the New World, but also served as models for many conventions later adopted, and furnished an ideal to guide the diplomacy of the

future. The resolutions of these congresses, for this reason have contributed in no small degree to the development of International Law, as we shall see in the final pages of this article.

v

If the congresses and pacts reveal the ideals, aspirations, and necessities of Latin America, the factors we have just noted show at the same time the obstacles which the various countries met in the effort to follow in the path of their desires. By describing the four principal difficulties (the supersensitive spirit of national independence, the civil wars, the boundary disputes, and the questions as to the navigation of rivers), we will see another aspect of the international relations of the Latin-American countries among themselves. The problems of special character to which these conditions gave rise, have contributed in a manner different from that already noted to the development of International Law.

The supersensitive spirit of national independence caused the old administrative divisions of the colonies to split up into several new states instead of bringing several states together under one government. At the time of the struggle for emancipation, there were four vice-royalties in Spanish-America (Mexico, New Granada, Peru, and Buenos Aires) and seven "Capitanias Generales" (Yucatan, Cuba, Puerto Rico, Santo Domingo, Guatemala, Venezuela, and Chile). Bolivar formed of New Granada, Venezuela and Northern Peru, the United States of Columbia, which fell away in 1830 into three States: New Granada, Venezuela, and Ecuador. The old vice-royalty of Buenos Aires became subdivided into four States: Bolivia (which was separated from the vice-royalty by Bolivar in 1825), Uruguay, Paraguay, and the United Provinces of the River Plate. The United States of Central America, founded in 1823, split up into five separate States in 1839. All the attempts of federation or confederation made after this date, had no appreciable result.¹²

¹² In some of the conventions celebrated by Latin-American countries, the case is provided for in which new states should be formed in America by the dismemberment of those then existing: (*e. g.*, Additional and Explanatory Convention of 1833 to the Treaty of Peace, Friendship, Commerce, and Navigation between Chile and the United States of America of May 16, 1832).

The civil wars and the system of revolutionary leadership ("caudillaje"), the logical and almost inevitable consequence of the wars of independence, have opposed enormous barriers to the progress of these countries to the height of prosperity to which they were called through their situation in a continent of undeveloped wealth. Although waged over problems of domestic politics, these wars had an international significance. They not only lead, in fact, to the intervention of several states in the internal policy of the others (intervention which was invited sometimes by the government itself of the country affected), but also caused the development of International Law problems which were new or little known: *e. g.*, the question of the recognition of the belligerency of rebels, the rights and duties of neutrality, the responsibility of the state in the event of civil war, the international position of *de facto* governments, and many others.

Failing the confederation of the Latin states, the problem of the marking of the boundaries which the pacts of confederation strove to solve, of necessity came day by day more prominently to the fore. The constitutions of some of the countries fixed their lines on the basis of the *uti possidetis* of 1810, which was, moreover, recognized in fact by all the states, and proclaimed in the Congress at Lima in 1848.¹³ Frequent conventions were concluded on the subject of boundaries. But, whether or not the boundary lines thus established were drawn on the authority of the *uti possidetis* of 1810, they were vague and sometimes conflicting, owing to the lack of precise geographical knowledge of the regions affected. For this reason, all the states of America have had boundary disputes with all of their neighbors. The peculiar geographical situation of these countries, located on the coast and with territory extending in toward the centre of the continent and delimiting several states at the same time, made such a clash inevitable. Brazil, for example, touches the frontiers of all the states of South America and the three Guianas.

¹³ The term *uti possidetis* of 1810, is generally understood to mean the territory which the respective countries had the right to possess according to the Spanish administrative divisions obtaining at that date, the date of the beginning of the movement for emancipation.

with the exception of Chile.¹⁴ Furthermore, the disputes extended over immense zones of territory¹⁵ which were oftentimes claimed by two or more states at one and the same time.¹⁶ It may be said that a very considerable part of the diplomatic history of Latin America reduces itself to an account of the struggle over boundaries. For this reason, and because of their great political and economic signifi-

¹⁴ *Vid.*, as to all the Brazilian boundary disputes, G. Taumaturgo de Azevedo: "Límites Do Brazil" in the "Livro do Centenario," (Rio Janeiro, 1902), Vol. III, pages 69-136.

¹⁵ Chile and Bolivia contested the sovereignty over two geographical degrees, the 24° and 25° of south latitude. This conflict, after being the subject of the treaties of August 10, 1866, and August 6, 1874, completed by the treaty of June 21, 1875, was the remote cause of the War of the Pacific about which we will speak later on. The dispute over the territory of the Missions, between Brazil and Argentine, involved 30,670 sq. kilometres. The dispute as to the boundary line between Chile and Argentine, affected 94,000 sq. kilometres. Peru lays claim to about two-thirds of the territory which Equador maintains belongs without question to it, covering about 240,000 sq. kilometres. By a convention of August 1, 1887, the affair has been submitted to the arbitration of the King of Spain. (*See*, on the origin of this conflict, Prado and Barreda: "Alegato del Perú en el Arbitraje sobre sus límites con el Ecuador," Madrid, 1905, pages 29-64.)

¹⁶ Bolivia and Argentine disputed with each other the possession of the Puna de Atacama, while the same contest was going on between Chile and Bolivia, without any controversy, however, between Chile and Argentine. After Bolivia had renounced its rights over the zone by treaty of May 10, 1889, with Argentine, the conflict went on between Chile and Argentine. The question was finally submitted to a commission, subsequently to an arbitral tribunal and finally to a "sur-arbitro," the minister of the United States in the Argentine Republic. The award gave to Argentine about the whole of the territory in dispute.

Bolivia and Brazil laid claim at the same time to a considerable strip of the Acre territory, a portion of which was then, too, claimed by Peru. In order to put an end to the case, Peru and Bolivia submitted the question to the arbitration of the Argentine government by the treaty of December 30, 1902. Shortly afterwards, by the Treaty of Petropolis of November 17, 1903, Bolivia renounced all its rights over the territory in litigation in favor of Brazil, ceding thus to this state a country to which Peru laid claim. Because of this, a question has arisen as to what influence this cession may have upon the arbitral decision of the Argentine government which has not yet been given. (*See*, on this matter, Renault, Lapradelle and Politis: "de l'Influence sur la procédure arbitrale de la cession des droits litigieux" in the "Revue Générale de Droit International Public, Vol. XIII, 1906, pages 309-324.)

And finally, the region called Putumayo is claimed by Peru, Columbia, and Equador.

cance, these contests occupy a place of capital importance in that history. They have given rise to armed invasions or to occupations of the tracts in litigation, by one of the interested parties and have, on more than one occasion, led to war. They have, as well, created interesting new problems of International Law: *e. g.*, rights and duties of the interested states in the territory in dispute, during the process of the contest; the value of *bona fide* acts of occupation in it;¹⁷ the responsibility of the states for acts of civilized persons or native tribes committed in the contested zones.¹⁸ These contests have been terminated generally by compromise or arbitration. In these cases, the arbitral sentence has always given more importance to titles of occupation, possession, prescription, etc., established by the interested states, than to the economic condition in which these territories would remain in consequence of the award. Thus, it has more than once occurred that these contests have been resuscitated, or remain only latent so that some day they may again become a new cause of conflicts.

By the special situation of the countries of America, the navigation of rivers has also been a problem of great importance which has given rise to serious conflicts where various States situated along the same river have had opposing interests.¹⁹

¹⁷ Sometimes to avoid the difficulties of this situation agreements called those of neutralization have been celebrated by which the states promise to forbear from exercising acts of possession, or not to disturb the *modus vivendi* in that territory (*e. g.*, agreement of 1842 between Brazil and England in the dispute as to the boundary line of Guiana; of 1850 between England and Venezuela for the same reason; in 1889 between Chile and Argentine).

¹⁸ See on these contests, Alvarez: "Des Occupations de Territoires contestés" in the "Revue Générale de Droit International Public," Vol. X, pages 651 *et seq.*

¹⁹ To put an end to these conflicts, numerous conventions have been concluded, which may be placed in three categories, while laws have been passed declaring the navigation of those rivers to be free. (See, on the matter Alvarez: "L'Histoire Diplomatique des Républiques Américaines" in the review just cited, Vol. IX, 1902, page 564, note 1.) Some of these conventions are of special importance. In 1853, the Argentine Confederation celebrated with Great Britain, the United States and France, treaties over the free navigation of the rivers of Parana and Uruguay. In these treaties the contracting parties agree to use their influence to prevent the possession of the Island Martin Garcia by any state of the River Plate or its confluents, that had not given adhesion to the principle of free navigation.

Together with the civil wars and boundary questions out of which have sprung such peculiar problems, there should be taken under consideration the wars between the Latin states, some of which have had a juristic importance and legal effects which cannot be lightly passed over in the history of International Law.²⁰

In order to complete the picture of the international relations between the Latin-American countries, we will say that the failure of

²⁰ In 1825, there broke out a war between the Empire of Brazil and the United Provinces of the River Plate, over the possession of the province of Montevideo. This had formed part of these provinces up to 1822, when Brazil annexed it under the name of "Provincia Cisplatina." When this province declared its independence in 1825, Brazil and the United Provinces entered upon a war with each other, as both had desired to incorporate it into their respective territory. The war was terminated by the treaty of the 27th of August, 1828, concluded through the mediation of the British government and completed by the convention of January 2, 1859, between Brazil, Argentina, and Uruguay. In this, the neutrality of Uruguay was proclaimed, Brazil and Argentine binding themselves to defend its independence and integrity. The sovereignty of Uruguay was limited in this pact in various ways, in its exercise in foreign affairs: it might not unite itself, confederate itself or sign treaties of alliance, or place itself under the protectorate of any nation, or part with any portion of its territory under any pretext. By the Treaty of Peace and Friendship of 1856 between Brazil and Argentina, the declarations of the convention of August, 1828, relative to the maintenance by those two countries of the independence of Uruguay, are confirmed. The neutrality of the Island Martin Garcia in case of war, is also stipulated, and the two countries agree to prevent this island from going out of the possession of the states of the River Plate interested in the free navigation of that River. On the 25th of February, 1864, these two countries subscribed a protocol concerning the employment of the fortifications made by Argentina on this Island.

In 1836, a war broke out between Chile and a confederation of Peru and Bolivia which had been formed in 1835 by General Santa Cruz, a confederation which aimed at securing the hegemony of South America and a predominant influence over the nearest states, Ecuador and Chile. Upon aid being given to the political refugees of Chile in Peru, in 1836, to prepare an expedition against Chile, this country declared war on the allied states and obtained the triumph of its cause in Yungai in 1839, with the dissolution of the confederation. Very reliable data exist, which lead one to judge that the English government was ready to support the chief of the Confederation, General Santa Cruz, who, in return for this, was to grant said government large commercial concessions. In this war Chile declared that it would follow three rules of International Law, which were favorable to neutral commerce: that neutral merchandise on board an enemy's ship could not be confiscated, that blockades must be effective, and that the flag covered the merchandise. And this, without requiring reciprocal

the attempts at confederation, the diplomatic disputes and the wars that have been waged, did not destroy the consciousness that they formed part of a family of nations that ought to draw closer together in friendship. The pacts which were signed for this purpose, called Treaties of Peace, Commerce and Navigation, bear the imprint of these fraternal feelings.

As a model for the draft of these treaties, the treaty celebrated by the United States with France on September 30, 1800, was used, after undergoing certain modifications and additions that were dictated by the pacts of confederation and the constitutions of the various states. These treaties often contain provisions for a defensive alliance and grant certain favors to the citizens of the respective countries on the subject of naturalization, and, especially, in matters of commerce, favors not granted to other countries. They also stipulate several ways of avoiding or deciding conflicts that may arise among them (as, a period to elapse and notifications to be given, before the beginning of hostilities, the acceptance of the good offices of a friendly country, and the invocation of the authority of special or general clauses of arbitration).²¹

The spirit of American fraternity has shown itself in certain parts of the legislation of several countries, above all in those relating to treatment, that is to say, even though neutral nations did not recognize these rules.

In 1864, in consequence of civil wars, a war broke out between Brazil and Uruguay, terminating in 1865. That same year, by the Treaty of Alliance of the 1st of May, Brazil, Uruguay, and Argentina bound themselves together to declare war against Paraguay to overturn the government of that country. These three states contracted the treaty obligation of respecting the independence, sovereignty, and integrity of Paraguay (art. 6), but in article 16 it is stipulated that the allies would cause the government of Paraguay to conclude with them boundary treaties on the bases indicated in the Treaty of Alliance. In the final Treaty of Peace, of February 3, 1876, between the Argentine Republic and Paraguay, are to be found provisions which aim to secure the free navigation for the commerce of all nations of the rivers of Uruguay, Paraná, and Paraguay.

²¹ In some, the parties promised not to celebrate treaties of peace and friendship with the Spanish government until it had recognized the independence of all the states of America formerly Spanish, or, at least, of the signatory states (Treaty of Peace, Friendship, Commerce and Navigation between Chile and the United States of Mexico, of March 7, 1831, Art. 15).

nationality,²² and in the protests which have been raised when any one of them has been the victim of a war or of armed intervention on the part of a European power.²³

VI

With this outline of the fundamental features of the political relations of the Latin-American states with each other, and postponing to the second period the study of the policy developed by the United States in Latin America as a whole, let us now turn to an examination of the relations of this part of the world with Europe.

If the Latin countries of America were determined to reject the domination or intervention of Europe in the New World, they perceived the importance, at the same time, of binding themselves closely to the Old World with which they entertained more active relations than with many of their sister states of the same race and continent. Thus it was that during the first years of independence, their foreign policy was inspired by the general purpose of cultivating closer relations with all the countries of Europe, including the mother country.²⁴

In 1836, Spain, without recognizing the independence of the new states, re-opened commercial intercourse with many of them on the basis of reciprocity. With the other states of Europe and with the United States, the Latin Americans began soon after their independence to make treaties known as Conventions of Peace, Friend-

²² As to this, see, Alvarez: "La Nationalité dans le Droit International Américain" Paris, 1907), No. IV, pages 17 and 18.

²³ For example, the French intervention of 1838 and the Anglo-French intervention of 1846 in the River Plate; the French intervention in Mexico in 1862; the war of Spain in the Pacific in 1864-1866, and various cases of the suppression by Spain of the attempts of Cuba to free itself.

²⁴ In spite of the fact that the domination of Spain had completely ended in America with the battle of Ayacucho, in December, 1824, it was not until December 4, 1836, that the Cortes passed a law authorizing the Spanish government to celebrate with its former colonies of America treaties of peace and friendship on the basis of the recognition of their independence. The first state recognized by Spain was Mexico, (Treaty of December 28, 1836). The others were almost all recognized after 1844. When this law was passed, the governments of nearly all the new republics, although already recognized by the other countries, believed it wise to open up the negotiations with the mother country in order to avoid all doubts as to their international relations with the latter.

ship, Commerce, and Navigation. In these, the stipulation relative to peace and friendship constituted the characteristic feature.

These conventions were modeled upon the already cited treaty of the 30th of September, 1800, between the United States and France, but contained modifications which breathed the liberal spirit which had hardly made its appearance in Europe. The principal innovations these treaties introduced consisted in more completely assuring commercial liberty, which, in the economic situation prevailing, was what was most needed by these countries; in declaring that the citizens of one country should have in the territory of the other state the same rights as the citizens of the latter; in regulating with greater detail the principles of maritime law that should be in force in time of war; in specially prohibiting their citizens from accepting "letters of marque" of a country at war with any one of the contracting parties on pain of being treated as pirates.²⁵ Those treaties further contain a "most-favored-nation clause" and in some of them, especially in those of early date, it is provided that this clause does not include those favors which have been or may be granted by Latin-American countries to each other in view of their common origin.²⁶ And, as a means of avoiding conflicts, it is stipu-

²⁵ The treaty of 1800, famous for the above reasons in American diplomatic history and because it suggested the provision of the Treaty of Commerce signed in the Congress of Lima in 1848, proposed to assure the liberty of commerce not only in times of peace, on the basis, then, of the privilege of the most favored nation (arts. 6 and 11), but also, and chiefly, in the case of war. For this case, the liberty of commerce of neutrals was stipulated, except in contraband (art. 12), enemy's goods in ships of the nationality of one of the parties is not to be confiscated unless it be contraband, but neutral goods in an enemy's vessel may be confiscated, unless it had been put aboard before the declaration of war, or afterwards, in ignorance of this event (arts. 14 and 15); a list is given of the articles of contraband (art. 13); the right of visitation is regulated (arts. 16 to 22) and the exercise of privateering (arts. 23 to 27). No way to avoid conflicts between states is specified, but the conduct to be observed in case of conflicts is indicated, a certain period being fixed during which the citizens of each country will be able to freely abandon the territory of the other (art. 8).

²⁶ See the protests made against this by the Secretary of State, Henry Clay, through the Minister of the United States in Mexico, which were directed to the Mexican Government because it refused to grant the United States the same favors as those granted to other American States. Hart, "American History Told by Contemporaries," Vol. III, pages 500 and 501.

lated generally that no one of the contracting parties may order or authorize any act of reprisal nor declare war against the other because of offenses or damage suffered, without first presenting a list of grievances to the other, reinforced by reliable proof and testimony, in which justice and satisfaction is demanded, of which the other party refuses or unreasonably postpones consideration. However, in some of the treaties, arbitration is established with the same purpose, but this arbitration is almost always restricted closely to the matters which are the object of the treaty.

In spite of the efforts of the new republics to maintain cordial relations with Europe and the United States, this period was not free from difficulties, some of which were of considerable importance. Some of these controversies involved territory and turned on the question of right to exercise sovereignty in a certain stretch of country; e. g., the controversy between England and the United Provinces of the River Plate on the occupancy by the first of the Falkland Islands in 1823; that between Haiti and the United States because of the latter's taking possession of the Island of Navassa in 1856;²⁷ and between Venezuela and Holland as to the possession of Aves Island.²⁸ Others had their seat in boundary matters, as in the conflicting claims of France and Brazil as to the line between French Guiana and the Republic,²⁹ and of England and Venezuela on the frontier separating British Guiana and the latter country.³⁰

On the other hand, the above countries in their relations with the Latins of America pursued a policy sometimes of armed intervention, in spite of the Monroe Doctrine, and at other times of protection of

²⁷ As to this little known controversy, see Moore: *op cit.*, Book I, § 81, pages 266-267.

²⁸ By the Convention of 1857, this controversy was submitted for decision to the government of Spain, which, on the 30th of June, 1865, gave a decision entirely favorable to Venezuela.

²⁹ By Convention of April 10, 1897, submitted to the Swiss Confederation for arbitration. The arbiter gave decision, April 1, 1900, in favor of Brazil.

³⁰ This controversy, involving the possession of 109,000 sq. kilometres, is notable in American diplomatic history as being one of the clearest cases of the exercise of the hegemony of the United States, as we will see later on.

France and Holland also had a dispute as to the delimitation of Dutch Guiana, which was brought to an end by the award of the Czar of Russia on May 13-25, 1891.

the interests of their citizens, adopting the procedure followed against the weaker states of Europe or semi-civilized countries — a policy growing out of the unfavorable opinion held as to the character of the international affairs of these states, almost all of which were infected by institutional instability and even anarchy. The United States, although feeling the solidarity of continental interests, judged Latin America in the same fashion as Europe and adopted a similar policy in this regard.

The conflicts caused by this policy of Europe and of the United States may be divided into *personal*, *financial*, and *political* groups.

The *personal* conflicts refer to claims arising from injuries received by individual citizens of those countries because of tumults or civil wars.

The *financial* group consists of claims growing out of damages or prejudices suffered by the property of said citizens, resident or non-resident in America, because of forced loans, confiscation, failure of the payment of coupons of the public debt, or for material injuries sustained as a consequence of civil or international wars, and the like.

The *political* cases are made up of the use of force against these states, either attacking their independence and sovereignty or compelling them to satisfy claims presented against them. In 1838, France intervened, establishing a pacific blockade, in the River Plate and in Mexico, declaring in both instances that she was not then committing an act of war.³¹ In 1842, 1844, and 1851, England directed blockades against the coast of Central America, and asserted claims to the protectorate of the Mosquito Coast, Nicaragua. In 1845, France and England intervened forcibly in the struggle of the dictator Rosas with the Republic of Uruguay.³² In 1861, Spain

³¹ In the first case, France justified her action in alleging the injustice of a law of the Argentine tyrant Rosas who attempted to naturalize and force to do military service foreigners residing for more than three years in the country and engaging in commerce or possessing real property. On this occasion, France interfered in the internal affairs of Argentine Republic and Uruguay. The conflict was ended by a compromise of the parties on October 29, 1840.

The second case involved the payment of a pecuniary claim. France blockaded the port of Vera Cruz, and took the fort of San Juan de Ulloa, whereupon Mexico declared war. Peace was established by the Treaty of March 9, 1839.

³² On the 24th of November, 1849, a treaty was celebrated between England

re-incorporated Santo Domingo into its colonial empire.³³ In 1862, France, under the pretext of protecting a financial claim, entered Mexico and established a monarchy. In 1864-1866, Spain waged a war against Chile and Peru.³⁴ As to the acts of hostility of the United States, the principal are: the war of 1846 with Mexico,³⁵ the bombardment and burning of Greytown or San Juan del Norte in Nicaragua in 1854, and the expedition of 1859 against Paraguay.

These three classes of conflicts (personal, financial, and political) have been settled either by the Latin States submitting to the demands of the claimant nations when these were powerful, or by compromise or by arbitration.³⁶

and Argentine Republic, which put an end to the English intervention in that country. In this, there is a curious clause stating that Argentina is in the full enjoyment and exercise of all the rights possessed by an independent nation. This article was included in the treaty on the petition of Rosas who complained that the European powers denied to the Latin-American states the sovereign rights which they themselves possessed.

³³ Its independence was again recognized by Spain in 1865.

³⁴ The cause of this war clearly shows the international situation in which, Spain maintained, the new republics that she had not recognized, found themselves. In 1864, she sent to the Government of Peru, which was in this situation, a "Special and Extraordinary Commissioner of the Queen", a title borne by the former inspectors charged with the supervision of affairs in the colonies. The Peruvian government declined to receive this individual save in the character of Confidential Agent. The envoy abandoned the country, and a Spanish fleet seized the Chinchas Islands, belonging to Peru, on the grounds of re-asserting its rights of possession. Spain alleged, in fact, that, as it had not recognized the independence of Peru, that only a state of truce existed between the two countries since the time of the struggle for independence. On the 5th of December, 1865, a Treaty of Alliance was entered into by Peru and Chile to repel the aggressions of Spain, an alliance which was entered into a little later by Bolivia and Ecuador. Chile, whose independence had been recognized by Spain in 1844, found herself involved in this war, owing to which the Spanish squadron blockaded and bombarded the port of Valparaiso. This act has given rise, among others, to an interesting question of International Law, as to what extent the bombardment of a purely commercial port entirely without fortifications is permissible.

On this occasion Spain gave assurance to the United States that the purpose of the war was not to change the republican character of these countries.

³⁵ This war came to an end by the treaty of February 2, 1848, by which the United States annexed New Mexico and California.

³⁶ Frequently, above all in case of numerous claims, it is stipulated that these be decided by Arbitral Tribunals or by Mixed Commissions. This procedure has lent itself to abuses, because of which it is disappearing.

These cases imply a fourfold violation of the general principles of International Law. The first, an exceptional occurrence, meant an unjust declaration of war or the forcible and insufficiently justified interference in the domestic affairs of these countries. The second, which consists of frequently occurring cases, consists of making claims for damages whenever citizens have been injured, especially by wars or revolutions. The injury is always alleged to have been due to the action of the government against which the claim is made, in spite of the fact that the latter could not be called to account because the acts had been done within the limit of its sovereign rights or, if such action had been abusively perpetrated by its citizens, it could not have been foreseen or guarded against by the state. The third is also very general and consists in taking up diplomatically all those claims which can be asserted against the Latin-American governments, even those which the interested parties should bring before the ordinary courts of justice. The fourth is to use force, such as the seizure of customs houses, pacific blockades, etc., in order to compel the recognition of claims. Comparing the intervention of the great powers since 1810 in the affairs of the weaker states of Europe with those exercised by them in Latin America, we find that in the former case they were inspired by the dictates of broad policy, humanity, or religion, while in the latter they acted with the sole purpose of assuring unduly for their citizens who came to those countries a specially privileged situation.

CHAPTER SECOND

I

In the second period of the history we are outlining, which runs, as we have said, from the middle to the last third of the nineteenth century, the international life of the Latin-American countries presents in several particulars an aspect quite different from that observed during the preceding years, and consequently its contribution to the development of International Law is different.

The idea of the confederation of all or of a part of Latin America, was abandoned as impracticable, principally owing to the fact that the fear of European conquest no longer existed. But as the states

still counted themselves as members of the same family, they strove to strengthen the bonds of friendship and commerce while regulating uniformly the juristic relations in many of the matters which are included in Private International Law; a uniformity which it is not difficult to obtain in view of the close analogy existing between their institutions owing to the fact of a common origin. In this period, therefore, the notion of solidarity does not disappear, but becomes modified and directed toward more practical ends which are more in keeping with the international life of these countries.

In 1877, there met in Lima, on the initiative of the Government of Peru, a congress of jurists of Latin America who labored to establish uniform rules of Private International Law. Two conventions were signed here, one on the above subject and the other on extradition, which were subscribed to by Argentina, Bolivia, Chile, Costa Rica, Ecuador, and Peru. The protocol on extradition was subscribed to, further, by Guatemala and Uruguay.

On the 3rd of September, 1880, the representatives of Chile and Columbia, in Bogota, signed *ad referendum* a convention of general, permanent, and absolute arbitration. In article 2, it was provided that the arbiter should be designated in a special convention, or, in default of this, the arbiter should be the President of the United States. In article 3, it was stipulated that both Governments should try to make similar treaties with the other countries of America "in order that the solution of every international conflict by means of arbitration may come to be a principle of American Public Law."³⁷

With this purpose, the government of Columbia addressed a circular to all the Latin-American governments inviting them to meet in a conference in Panama in 1881 in order to sign there pacts similar to those entered into with the government of Chile. Only Brazil, at that time an empire, was omitted from the list of those invited. Almost unanimously the governments accepted the invitation. Mexico refused its adherence on the score that she did not deem it wise to

³⁷ In various conventions of Latin-American States, such expressions as "American Public Law" and even "South American Public Law" are to be found (See, Preamble of the Treaty of April 20, 1886, between Peru and Bolivia on the fixing of boundaries), which manifest the solidarity of interests which is believed should exist between all the states of Latin America.

pledge herself to such wide principles of arbitration. The Argentine government declared, in a note dated the 30th of December, 1880, that, in its concept, the projected conference should not limit itself to the signing of a treaty of arbitration, but should proclaim several principles of American Public Law as the best method of securing the solidarity of the countries of the continent. The principle which, above all others, it desired to see proclaimed, was that guaranteeing to all the states of Latin America their territorial integrity. This was not a new idea. It had already been expressed in the pacts of Confederation and Union of which we have already spoken, and the Argentine government itself had rejected it in a note replying to an invitation to adhere to the Treaty of Commercial Union of Santiago, 1856.³⁸ Only the representatives of Guatemala, Salvador, and Costa Rica assembled at the time the Congress convened, whereupon the assembly was dissolved.³⁹

On the occasion of the centennial of the birth of Bolivar, in 1883, the representatives of several American republics met in Caracas. There they signed a document which, conceived in the lyric vein of the first period, proclaimed certain principles of American public law among which was the recognition of arbitration as the best method of settling international disputes.

In 1888, the Governments of Uruguay and Argentina invited the Latins of America to an international congress to meet in Montevideo in order to draw up a treaty on the subject of the various matters of Private International Law. Almost all the states of Latin America took part in this meeting and signed conventions concerning civil law, commercial law, penal law, the law of procedure, copyrights, trademarks, patents, and the exercise of the liberal professions. It does not come within the limits of this article to touch

³⁸ In emitting an opinion in 1880 which was different from that of 1856, the Argentine Republic obeyed a political purpose,—that of preventing Chile (at the time, victorious over Peru and Bolivia) which maintained strained relations with it on account of a boundary dispute, from annexing a portion of Peruvian territory.

³⁹ The government of Chile, in view of the fact that the projected conference was intended principally to meddle in its foreign policy, not only refrained from ratifying the cited convention of 1880 and from participating in the Congress, but succeeded in prevailing upon several Latin states not to attend it.

even lightly upon the principles contained in these conventions which incorporated the most liberal doctrines proclaimed by European publicists on the matters involved. But it may be said in passing that the states of America, in signing these conventions, agreed that because of the fact of their common origin and interests they could come to a general understanding regarding many matters which could not be accepted by the world in general. Although these treaties were not ratified by all the signatory states, yet they have exercised a considerable influence in the mutual relations of these countries in these matters, while perceptibly contributing to the development of International Private Law.⁴⁰

In this period, more than in the former, the Latin-American countries agree upon arbitration, either general or special to the subjects of the treaty, as a means of deciding controversies arising between them. In spite of the similarity of national interests, this period presents the same elements as the former to menace their reciprocal relations — civil wars, boundary disputes, quarrels arising out of questions of the navigation of rivers, and wars between the countries themselves. An attempt is made to prevent the occurrence of civil wars by treaty agreements to adopt energetic measures against all efforts to organize in the territory of the one, revolutionary movements against the other contracting party. Further, any interference of the states in the domestic affairs of the others because of these wars, is prohibited by agreements that possess real practical importance.⁴¹ Many of the boundary questions of this period were, as in the former period, settled by arbitration.⁴² Among the wars

⁴⁰ These treaties have been ratified by Argentina (law of December 11, 1894), by Paraguay (law of September 3, 1889), by Peru (law of October 25, 1889), by Uruguay (October 1, 1892), and by Columbia (Decree of November 17, 1903). By virtue of a provision of those pacts permitting states which had not signed them to adhere to them later, France, Spain and Italy and Belgium became parties to the Treaty on Copyrights, during 1896, 1899, 1900, and 1903, respectively.

⁴¹ See the agreement between Argentina and Uruguay, of January 14, 1876, which was not ratified.

⁴² One of the principal contests was that between Argentina and Paraguay as to the possession of the territory between the River Verde and the main branch of the Pilcomayo together with the Villa Occidental, submitted by the Convention of February 3, 1876 (art. V) to the decision of the President of the United States of America, who handed down his judgment on the 12th of November, 1878.

then waged, that fought in 1879-1885 by Chile against Peru and Bolivia united by a secret treaty of alliance signed in 1873, is the most important as it radically modified the map of the western portion of America⁴³ and has even up to the present day given rise to interesting problems of International Law that were scarcely known before, at least, in the same clear-cut form. Some of these problems involved the question of the rights of a belligerent in enemy territory occupied by his arms; the limits to the authority of the victor in territory which the losing party has turned over to him by an act of truce or of peace, in full sovereignty but not finally; the value to be given by the victorious state to the concessions made by the conquered power to private parties over a tract of territory ceded by a treaty of peace; the value of security which had been given by the conquered state over the same territory in order to guarantee financial obligations; the moral or legal responsibility of the annexing state as to foreign creditors of the state annexed; and, finally, concerning the arrangements for the taking of a plebiscite to decide the nationality of territory.

⁴³ Upon declaring war, the government of Chile published in the *Diario Oficial* (October 10 and 20, 1879) the instructions which the United States issued for its armies in the field, as well as the declarations of several European international conferences (Brussels, Geneva, and St. Petersburg) on the laws and usages of war. These were given as a guide for the conduct of the Chilean army during the operations of war. The war was closed, as to Peru, by the treaty of October 20, 1883. By article 2 of this treaty, Peru ceded to Chile the province of Tarapacá and by article 3 placed Tacna and Arica under the sovereignty of Chile, postponing for 10 years a plebiscite which should decide the final sovereignty over these provinces. The plebiscite has not been taken, because the parties have not been able to agree as to the conditions under which it is to be celebrated. Respecting Bolivia, the war was suspended by the truce of April 4, 1884, according to which the territories lying between parallel 23 and the mouth of the River Loa in the Pacific, which had been occupied by the military forces of Chile during the war, should continue subject to the sovereignty of Chile. The final treaty of peace was arranged on October 20, 1904, in which the sovereignty of Chile over this region is recognized. Chile has been reproached without reason for having occupied these territories without a previous declaration of war. In fact, this country, after seeing that Bolivia rejected the offer of arbitration, not only addressed to Bolivia an ultimatum, but proceeded to occupy this zone of territory on the grounds of *rei vindicatio* inasmuch as Bolivia had violated the treaty of 1866, the purpose of which was to put an end under certain conditions to the old boundary dispute between the two countries as to parallels 23 and 24.

II

As to the relations existing between the Latin-American countries and Europe, the intercourse grew closer and more frequent. The reason for this was that Latin America felt a growing need not only of the culture and the intellectual material and the commerce of Europe, but also of its capital and population to develop its wealth and populate its territories. Because of the above, these states concluded with those of the Old World numerous conventions, and adhered to many of the conventions of general interest concluded by the European states among themselves, especially the International Unions, thereby giving to these Unions a world character.

Two factors which should serve as most powerful bonds between the two continents (the attraction by America of European capital and population) have given rise to a certain antagonism of interests between the two centers, producing problems *sui generis* in International Law. This antagonism has developed over the question of immigration. For, it is to the interest of the American states, colonizing their own territory, to bring from Europe the greatest possible number of skilled workmen fitted to develop the industries of the country; and on the other hand, it is to the interest of the European states that this desirable element should not leave their territory. And so serious is this antagonism that, in proportion as the immigration to the American states increases and the governments of these countries organize in Europe special service for attracting it, the European countries establish fresh conditions tending to prohibit or at least restrict the emigration of the desirable laboring element.

Nor is this all: on the question of the nationality of the children of immigrants, born in America, the interests and ideas of the two worlds are equally antagonistic. For, according to the principles of *jus sanguinis*, followed in nearly all European legislation, the children of those immigrants keep the nationality of their parents; whereas, according to the legislation of the American countries, they take the nationality of the country in which they are born. The Latin-American states, in effect, desire that the descendants of foreigners, born within their territory, be incorporated in those states,

become a component part of the ethnic element and contribute to form the population. With this end in view, these states have established, not only in their laws, but in their constitutions, the principle of *jus soli* as the basis for determining nationality. And it is almost impossible to reconcile these laws, owing to the necessity these countries have of increasing their population.⁴⁴

Further, the enormous development which colonization by immigration has taken in certain Latin countries, and the manner of organizing the movement, has resulted in turning over great stretches of territories to the newcomers, large districts of which are thus peopled almost exclusively by Europeans of the same nationality. It has come about because of this curious circumstance, that the countries to which these immigrants belong consider some of these regions almost as their colonies, and pretend to exercise an influence, morally at least by their schools and similar institutions, to keep alive in them the love of the mother country. In this may be found the germ of possible conflict of a political character between the two continents.

As to foreign capital, the investments have been made not only in commerce, but also in loans for speculation. These loans have produced interesting and peculiar problems relating to the responsibility of the debtor state and the nature of the security given to guarantee the obligations. Capital which sought speculative investment has often been employed in buying large tracts of land over which the capitalists pretended to exercise wide authority, to the derogation of the sovereign rights of the state in which the lands were located. And this is not all: some states, in order to secure European capital, have sold or leased portions of territory to foreign syndicates, granting them, in the latter case, certain attributes of sovereignty, which has created serious international problems involving the value or import of this peculiar class of conventions.⁴⁵ Outside of these

⁴⁴ As to the importance of this matter, the problems involved in it, and the several solutions given to the problems by the laws of Europe and America, see Alvarez: "La Nationalité dans le Droit International Américain," Paris, A. Pedone, 1907.

⁴⁵ The most characteristic case is the concession made by Bolivia, by the law of December, 1901, to a North American syndicate, of a portion of the Acre terri-

special relations from which several complex problems have grown, there have arisen also conflicts which although less serious than those giving character to the former period, have yet been numerous. These are based principally on the diplomatic claims urged by European nations for their citizens, claims which have been usually flimsy and unsupported by sufficient proof.⁴⁶

In order to put an end to these abuses, the countries of Latin America have entered into treaties with Europe in which it is provided that a state is not responsible for injuries suffered by the citizens of a foreign country in case of civil war, unless the constituted authorities have been guilty of negligence in the suppression of it; and that every claim of a legal character which is brought by the citizens of one state against the government of another must be presented to the competent authority of the latter country, the state to which the claimant belongs, not being able to protect him diplomatically except in the event of a denial of justice.⁴⁷

III

It is important now to turn to a consideration of the international policy pursued by the United States in relation to the Latin countries of the New World, in order to complete the picture we are making of

tory, the title over which Bolivia disputed with Brazil. Brazil protested against the concession, and the controversy ended by the already mentioned treaty of Petropolis, by which Brazil paid indemnity to the syndicate whose concession was taken away. See Moore: *Op cit.*, Vol. VI, pages 440-442.

⁴⁶ Among these claims it is well to cite what arose between Italy and Columbia because of the confiscation in 1885 by the government of the Republic, of the property of the Italian subject Cerruti; this claim was settled by the Convention of August 18, 1894, by which the matter was submitted for decision to the President of the United States, who rendered his decision March 2, 1897.

⁴⁷ Treaty of December 5, 1882 (art. 18), between Mexico and Germany; treaty of July 29, 1885 (art. 21), between Mexico and Sweden and Norway; treaty of November 27, 1886 (art. 11), between Mexico and France; treaty of April 16, 1889 (art. 12), and of April 16, 1890 (art. 12), between Mexico and Italy; treaty of July 23, 1892 (art. 20), between Columbia and Italy; treaty of June 7, 1895 (art. 15), between Mexico and Belgium; treaty of September 22, 1897 (art. 16), between Mexico and Holland.

It is worthy of note that neither England nor the United States have ever wished to conclude treaties of this kind with Latin-American states. These states have, however, entered into treaties of this nature with each other. For a

the characteristic traits of the international relations of those countries. This policy may be examined from the standpoint of the extension in America of the territory of the Union, in the relations of this country with the separate republics of Latin America, or, finally, in its bearing on the whole American continent. It is not incumbent upon us to study that increase of territory which forms a part of the imperialistic policy of the United States,⁴⁸ nor will we turn back to review those interstate relations in which, as we have seen, the United States adopted the attitude of Europe in looking down with disdain upon the new nations. We will on the other hand trace the general lines of the policy of the United States in the last phase, that is, in its relation to the American continent considered as a whole. We will study this policy by bringing together in a single picture the three periods in which we have divided the diplomatic history of the Latin-American Republics. In this manner, we shall be able to understand its origin, object and import, as well as its importance under the point of view of International Law.

We will begin by passing rapidly through the mass of messages and correspondence of the Presidents of the United States, from Washington to Monroe, in order to trace to their first manifestations the ideas and sentiments of that country as to the other states of the American continent.

Washington, in his Farewell Address, said that the interests of Europe differ from those of the United States and that the "detached and distant" situation of the latter invite and enable it to follow a different line of policy.⁴⁹ In 1808, Jefferson, then President, said

list of these cases, *see* Alvarez: "L'Histoire Diplomatique des Républiques Américaines" in the "Revue de Droit International Public," Vol. IX, page 563, note 1.

⁴⁸ While the territorial history of the Latin states reduces itself to a struggle over boundaries, that of the United States is that of the extension of territory. *See*, as to this expansion of the United States, Viallate: "Essais d'Histoire Diplomatique Américaine" (Paris, 1905), pages 3-56. In this growth, Latin countries on the south and west were absorbed. The contribution which this element has made to the culture of the great republic has never been properly studied.

⁴⁹ Richardson's Messages, 1:222, cited by Foster: "A Century of American Diplomacy" (1901), page 439.

to the Governor of the Territory of New Orleans, that the interest of Cuba and Mexico as well as that of the United States is "to exclude all European influence from this hemisphere."⁵⁰ In 1820, when the independence of Latin America was practically assured, Jefferson alluding in a private letter to a conversation with the minister of Portugal in Washington, said: "From conversations with him, I hope he sees, and will promote * * * the advantages of a cordial fraternization among all the American nations, and the importance of their coalescing in an American System of Policy, totally independent of and unconnected with that of Europe."⁵¹

It is curious, too, to follow through the messages of Monroe from 1817 to 1823 the same first manifestations and the evolution of a policy as to the states of the New World which were beginning their independent life. On the 2nd of December, 1817, Monroe calls attention to the fact that "through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the *parties* in men, ships, or munitions of war. * * *."⁵² Two years later, although persisting in a strict neutrality, the President declared that "this contest has from its commencement been very interesting to other powers and to none more so than to the United States. A virtuous people may and will confine themselves within the limit of a strict neutrality; but it is not in their power to behold a conflict so vitally important to their *neighbors* without the sensibility and sympathy which naturally belong to such a case."⁵³ In 1820 and 1821, he declared that he was disposed to repeat the "friendly council" already offered by his Government to Spain in order to bring about an "adjustment between the mother country and the colonies on the basis of the independence of the latter." In 1822, the Congress of the United States passed a law recognizing the independence of Mexico and

⁵⁰ Writings of Jefferson, 9:213, cited by Foster, *op cit.*, page 440.

⁵¹ Jefferson's Works (1854), 7:168, cited by Foster, *op. cit.*, pages 440 and 441.

⁵² Hart: "American History Told by Contemporaries" (1902), Vol. III, page 496. In a note of January 19, 1816, to the Spanish Minister de Onis, Monroe considered the Latin-American Republics as belligerents.

⁵³ Hart, *op. cit.*, Vol. III, page 495.

of the other countries of South America. Therefore, the belligerents of 1817, after becoming "neighbors and fellowmen" of the United States in 1819, are denominated in 1823 "our southern brethren * * * whose independence we have on great consideration and on just principles, acknowledged."

In 1823, a new era opens in the policy followed by the United States in its relations with the rest of America. That republic then understood that it was bound to the other states of the hemisphere not only by reason of being neighbors, but because of a continental solidarity in everything pertaining to the independence and sovereignty of the new nations. In that year, under historic circumstances known to all, Monroe, while having primarily in view the interests of his country, expressed and epitomized in such a clear manner the essence of the international situation of the New World, that his declaration became, as we have already said, although he did not aim to formulate an invariable norm of international policy, the Gospel of the New Continent.⁵⁴ This message, which declares that the political system of Europe is different from that of the American states, contains declarations which may be epitomized in the following points:

1. The states of the New World are entirely independent and sovereign.

2. And, consequently, the régime of the balance of power and intervention, the basis at that time of the international politics of the Old World, can not be extended to them. European intervention is condemned, not only when its object is to change the form of government adopted by the states, but when it aims to oppress them or to control their destinies in any way.

3. That the states of Europe can not acquire by occupation any part of the American continent.

Together with these three explicit declarations, there are three

⁵⁴ For this reason the doctrine contained in these declarations has subsisted up to the present time, when it is being applied and interpreted, while other declarations made subsequently in various messages by other presidents of the United States and referring to important American affairs have been completely forgotten.

others of a more or less explicit character which complete the "doctrine: "

1. That respecting the colonies of Europe then existing in America.
2. The political equality of the states of the continent, particularly from the point of view of their independence which therefore negated the right of any to interfere in the internal affairs of another.
3. The non-interference of the United States in the domestic affairs of Europe, save when they constitute a menace for the independent existence of America.

On declaring the intervention of Europe in America is not to be tolerated and that the American continent is not open to European colonization, Monroe contradicted two principles of International Law at that time in force: . that of intervention and that of the acquisition by occupation of the territories that were *res nullius*. The contradiction of this second principle is particularly important, as it in reality amounted to establishing, that, in America, all territory, even that which was not explored, and which was consequently *nullius* (and in this condition there were vast stretches of country), was subject to the sovereign authority of the American country within whose limits it was located during the colonial epoch. The view is obtained on the basis that the territory of this continent has already been distributed among the states of America, and that each one exercises real sovereign authority over all the land which belongs to it, even though the regions be totally uninhabited.

The Monroe Doctrine may be synthesized in this fundamental idea: *no one of the two continents may intermeddle in the affairs of the other*, and on this all America stands united.

On recognizing that a solidarity of interests as to the continuance of their independence existed between the states of America, Monroe did not do more than serve as an echo of the sentiment that then predominated in all the republics. Therefore, whether the famous message of 1823 had been written or not, the principles contained in it would always have been sustained in the New World. In this sense, it may be said, and not without a certain amount of truth, that the Monroe Doctrine is neither *doctrine* nor of *Monroe*.

But that which constitutes its undeniable merit and makes it famous, is that such an exact synthetic statement of the destinies of America should have been given thus early in the period of emancipation, by a people whose increasing power would not permit the rest of the world to regard that statement as merely Utopian. It was this that enabled America, from the very beginning of independent life, to give to its foreign policies a safe norm instead of the vague ideas then existent on these subjects. In this sense the Monroe Doctrine is *doctrine* and is of *Monroe*.

The best proof of the statement that the Monroe doctrine expressed the aspirations of all America, is to be found in the fact that from the date of the Congress of Panama of 1826, all the Latin-American states have not only striven to proclaim it solemnly but also to unite to make it respected; the resolutions passed by this congress and by the others of this period, not only agree with it and clearly show the effect of its influence, but make an effort to extend it; a similar influence is seen to have been exerted by this doctrine upon the conventions celebrated by the Latin states with one another.⁵⁵

The solidarity of the American continent only aimed to repel the interference of Europe and not to isolate the hemisphere from the civilization of the Old World, a pretention which would have been absurd, in view of the fundamental differences between the two groups of American nations, each one of which had closer intercourse with Europe than with the other, as the civilization and commerce of Europe furnished elements of life and culture to both.⁵⁶

⁵⁵ This doctrine exerted a palpable influence in the treaty of January 2, 1859, between Brazil, Argentina, and Uruguay, relative to the recognition of the independence of the last-named country (art. V).

⁵⁶ The contradiction which Secretary Clay reproached Mexico with in a letter of November 9, 1825, to Poinsett, Minister of the United States in that country, does not, then, exist. This letter states that Mexico considers the United States as a member of the American family of nations and invokes its protection when it believes that its independence is menaced by Europe, while placing the United States in the same category as Europe when the matter at issue is one of commerce, since it refuses to grant to the United States those special favors which it has given to other American states. See American State Papers, Foreign Relations, 2d Series, Washington, 1859, VI, pages 579-583, cited by Hart, *op. cit.*, Vol. III, page 501.

The determination of the New World to live politically independent of Europe, formed the basis of its international relations with the latter. The interference of Europe in America, of which we have spoken in a preceding section, did not arrest the development of this feeling of independence; on the contrary, it served to revive in the American states the desire of maintaining their independence.

After understanding the Monroe Doctrine in the above manner, that is to say, as the happy expression of the idea as to the peculiar situation which the New World should hold in the community of nations, it becomes idle to discuss, as has been done by some publicists, as to whether or not it was formally proclaimed by the government of the United States; whether or not it has been recognized by the governments of Europe; whether or not it forms a part of International Law or is in conformity with reason and best policy.⁵⁷ It is the expression of the will of America, which all the states of the continent have wished to see carried out; and the United States, as the most powerful among them, has caused it to inspire in other nations the respect which the increasing power of that great republic has imposed.

Publicists have not only failed to see the real origin and nature of the Doctrine, but have disfigured its true meaning. For the majority of persons, it is the basis of the policy of hegemony which the United States is developing on the American continent. The writers, however, are not agreed as to the significance of this policy. The publicists of the Old World believe that the United States has repelled Europe from America only with the object of substituting its own influence for that of Europe. Anglo-Americans believe that the Monroe Doctrine is the sacred text which the United States should apply and interpret in its relations with the mass of Latin-American states; and the few publicists of these countries who have studied the Doctrine see in it a mere pretext for the gradual and progressive absorption by the great republic of the rest of the continent.

⁵⁷ Among other objections urged against the Monroe Doctrine, see the statements of Prof. Münsterberg of Harvard University, in Moore, *op. cit.*, Vol. VI, pages 528 and 529.

These points of view are inadmissible, since the idea of hegemony does not grow out of the Monroe Doctrine nor is its development dependent upon it: and the same objection may be made to the attempt to include within the category of "hegemony" every step taken by the United States in international policy in the American continent.

The hegemony of the United States is the fruit of the prodigious and rapid development attained by this country, outdistancing the other American republics, and the *de facto* recognition of this circumstance not only by the states of Europe but also by those of America. So it has been able to pursue a policy on the continent which may be considered from three different points of view and which has worked toward three different ends:

In the first place, the United States as the most powerful country in the western world, has maintained the Monroe Doctrine not only in the cases originally foreseen by it, but also (as in the case of the Monroe Doctrine, in looking to its own interest) has caused it to serve as an expression of the growing necessities and aspirations of the states of America, aiming to assure their independence and territorial integrity. In this direction it has aimed to maintain and develop the Monroe Doctrine.

In the second place, and keeping pace with the above, may be noted the effort of the United States to assert its material preponderance in the new continent, especially when there has been a question of its own interests.

Thirdly, with the purpose of protecting the states of America, it has taken active part in all the international questions of these republics that it believed to be of continental importance, particularly when the latter have become involved in conflicts with European states.

The following belong to the first category:

Cases involving the maintenance of the Monroe Doctrine: declaration of Secretary of State Buchanan in 1848, at the time of the attempt of General Flores to invade Ecuador;⁵⁸ declarations and attitude of the United States upon the French invasion of Mexico

⁵⁸ Moore, *op. cit.*, Vol. VI, page 473.

in 1862;⁵⁹ declaration of Secretary of State Seward, during the war between Spain and Chile-Peru;⁶⁰ protest of the government of the United States against the re-incorporation of the island of Santo Domingo by Spain.⁶¹

Cases of the development of the Monroe Doctrine: (a) To prevent the states of Europe from acquiring under any pretext, even with the acquiescence of the American countries, any portion of the continent, or from establishing a protectorate over any American state: declaration of Polk in 1848 as to Yucatan; declaration of 1895 upon the proposal of Nicaragua to cede to England Corn Island as a Naval Station; declaration of 1904 and 1905 in connection with the coercive measures of England, Italy and Germany against Venezuela.

(b) To prevent any European state from entering upon an occupation of a more or less permanent character, even as a war measure, of any part of the territory of an American country; declaration in 1840 by Van Buren that the United States would prevent by force the military occupation of Cuba by England; declaration of President Roosevelt at the time of the above-mentioned action of England, Italy and Germany.

The first class of questions can not be placed under the heading "hegemony of the United States." As in the case of the Monroe Doctrine, they synthesize and accentuate the sentiments of the entire continent. The United States as the most powerful of the states of America becomes the natural spokesman of the continent and charges itself with the duty of making their ideas respected, to the mutual advantage of all. This is proved not only by the fact of the logical extension of the Doctrine, but also because the points comprised in the first division of questions have been proclaimed by the Latin states in their congresses, as we have already seen. This view gains strength also through the circumstance that whenever the Latin states found themselves in any of these difficult situations, they turned to the Republic of the North for protection;

⁵⁹ *Idem*, pages 488 *et seq.*

⁶⁰ *Idem*, pages 445-446 and 507.

⁶¹ *Idem*, pages 515-518.

and, finally, because these states have striven to discover new applications for the Monroe Doctrine such as the famous proposal of the Argentine Government, known under the name of the Drago Doctrine, regarding which we will have something to say later on.

To the second category belong:

(a) To prevent one European state from transferring to another, without the consent of the United States, the colonies it possesses on the New Continent: declaration of Clay in 1825, to the governments of France and England, to the effect that the Union would not permit Spain to transfer Cuba or Puerto Rico to a European country. President Grant later reaffirmed this.

(b) To present itself as the sole master and guardian of every highway between the United States and Panama to connect the two great oceans: Clayton-Bulwer Treaty of 1850. This treaty is "anti-Monroe" as it accepts the principle that a European power may have a word in American affairs, but the negotiations of the United States to abrogate the treaty⁶² constitute manifestations of the leadership of the nation.⁶³

(c) To intervene in the formation of new states in America, whether their establishment be through act of emancipation, secession or otherwise (emancipation of Cuba and secession of Panama).

In the third category are to be found numerous well-known examples, among which it may be well duly to call to mind here the interference of the United States in 1895 at the time of the dispute between England and Venezuela as to the boundary of British

⁶² For example, the declaration of Hayes in 1880, of Garfield in 1881, of Secretary of State Blaine in the same year, and the Hay-Pauncefote Treaty of 1901.

⁶³ Moore, *op. cit.*, Vol. III, pages 130-262. In 1862 occurred another act of the United States which is "anti-Monroe." At that time, when Colombia asked the aid of the United States in accordance with the treaty of 1846, for the purpose of re-establishing order on the Isthmus of Panama, the Secretary of State (Seward) asked the governments of Great Britain and France to join the United States in taking measures to maintain freedom of transit on the isthmus. The two European governments declined the invitation. The government of Mexico protested to the government of the United States against the effort to introduce the intervention of Europe in American affairs. Mr. Seward in reply declared himself to share the opinion of the Mexican government, adding that the attitude of the United States had been incorrectly interpreted. (*Diplomatic Correspondence* [1863], page 1150.)

Guiana. In this intervention, which is a most characteristic act of hegemony, the discussion between the chancelleries of the United States and England on the Monroe Doctrine, involved the point advanced by Olney that American problems could only be solved by Americans. President Cleveland (message of December 17, 1895) invoked the Monroe Doctrine. The conflict was terminated by the Treaty of February 2, 1897, between England and Venezuela⁶⁴ which submitted the question to arbitration, and on the 3rd of October, 1889, almost the entire territory was adjudged British soil.

The second and third categories come properly within the limits of the idea of hegemony and not of the Monroe Doctrine,⁶⁵ to which, indeed, they rather run counter.

If the states of Latin America do not look with great favor upon the policy indicated under the second heading, they at least do not condemn it, providing it be pursued with reason and all proper moderation. As to the third category, these states not only do not reject it, but have sought and always will seek protection under it whenever it may operate to their benefit. But the circumstance that the United States has not always taken the lead with the necessary tact, has not at all times given its protection to the countries of America, and has held itself aloof with disdain from these repub-

⁶⁴ Moore, *op. cit.*, Vol. VI, pages 533-583.

⁶⁵ It is another error of publicists to confuse the leadership of the United States with imperialism, or, at least, not clearly to distinguish between these ideas. The former has to do exclusively with the politics of the American continent, while imperialism is the natural path followed to-day by all nations which have attained great military and economic progress, the end of which leads to the extension and development of commerce as well as political supremacy. It principally shows itself in the effort to obtain more territory, especially for colonies; to exercise more or less influence in the affairs of certain countries of Asia and Africa in order to procure markets favorable to the commerce of the foreign power, or to intervene in matters having to do with the European balance of power. According to this, the extension of the frontier of the United States, embracing Texas, California, and Puerto Rico, is imperialistic in character and not the result of acts of hegemony. The purpose of this study is not to show to what point imperialism destroys the principle of liberty and equality of all the states and how far this policy, which has exercised such a deep influence in the development of International Law, is justified.

lies until a late day, explains the dread they have felt of the hegemony of the Union, a fear fomented by the press and literature of Europe which represents the United States as preparing to absorb all America.

The extension given to the Monroe Doctrine and the hegemony of the United States, unlike the doctrine itself, have not been formulated as one piece nor at one time or in a solemn manner; on the contrary, they have grown little by little as circumstances have required them. And it is even more curious to note that the United States did not appeal to the doctrine during the time when it was strictly applying the principles contained therein, and that it has appealed to it when its application was not in point and when the act in question was one of hegemony (*e. g.*, in the above mentioned conflict between England and Venezuela).

The hegemony of the United States, as well as the Monroe Doctrine, has been attacked in Europe as lacking any basis in International Law. But the truth of the matter is that the leadership of the United States as well as the doctrine have been tacitly recognized by the states of Europe, which have been the first to turn to the United States in conflicts with Latin-American states. Further, the United States solemnly and emphatically re-asserted its determination in the matter in the first Hague Conference. This country then showed itself more firmly than ever disposed, according to the expression of one of its delegates, "to maintain this policy and the Monroe Doctrine, in its later *approved and extended form*, carefully and energetically."⁶⁶

It may be said regarding the position of hegemony of the United States, that it has usually asserted itself in efforts to prevent civil wars in countries on the shores of the Gulf of Mexico. Only one case is to be found where it has acted in the rest of the continent: viz., in opposition to the restoration of the monarchy in Brazil, in 1893-1894.⁶⁷

⁶⁶ Holls "The Peace Conference at The Hague" (New York, 1900), pages 270-272. Compare "Rapport de la Délégation Française," page 40, cited by A. Mérignhac: "La Conférence Internationale de la Paix" (Paris, 1900), page 337.

⁶⁷ Moore, *op. cit.*, Book II, pages 1113-1120.

It may be further said that its manifestations have not shown the same intensity in every part of the continent: it has been much more effective in countries lying close to the United States than in those that are more distant. The interference of the northern republic has been particularly marked in countries situated on the Gulf of Mexico (Cuba, Panama Canal, secession of the Republic of Panama, boundary dispute between Venezuela and England). However, there is one case on record where it not only did not desire to intervene but when it refused to do so after having been called upon for assistance — in the matter of Lueders out of which grew the difficulty between Germany and Haiti. On this occasion Secretary of State Sherman declared that the Monroe Doctrine did not compel the United States to be involved in the continual conflicts between American republics and other nations.⁶⁸

As to the countries situated south of the equatorial line, the leadership of the United States has hardly ever been asserted, owing to the small interests the Union has in these regions, the difficulties of distance, and the more perfect organization of the governments there, which has not made it necessary to interfere in their relations with foreign powers. On several occasions, the United States refused to intervene: as, in 1881, at the time of the war between Chile and Peru, when it declined to join France and Great Britain in order to put an end to hostilities,⁶⁹ and, in 1897, in the boundary dispute between Chile and Argentina.⁷⁰

The hegemony of the United States, above all, according to the significance it has in the third division, is comparable to the system of "balance of power" which was exercised in Europe by the Great Powers, though the two notions are by no means to be confounded. Far from deserving absolute condemnation, as has been lightly said by certain publicists, it should be differently judged, as having been generally beneficial to America, as it has made this hemisphere respected by the countries of Europe in spite of the acts of intervention that have been carried out against it. But,

⁶⁸ Moore, *op. cit.*, Book VI, page 475.

⁶⁹ *Idem*, Book VI, page 508.

⁷⁰ *Idem*, Book VI, pages 435-436.

if this hegemony is not more burdensome than the European "balance of power," its application possesses this one defect, however — that, being exercised by a single country it is not subject to proper control. Consequently it will never have the prestige and moral weight that is enjoyed by the former.

The conclusion which we reach is that the Monroe Doctrine with the extension of its principles, as well as the policy of hegemony, gives yet another characteristic touch to the international relations of the states of the New World, and, is, consequently, of great importance to International Law.

The Monroe Doctrine, far from being a thing of the past, as some publicists pretend, is still of present importance in the sense that it denies the existence of territories "*nullius*" in the American continent, territories which could be acquired through occupation by European countries. Certain contemporary text writers have therefore fallen into a grave error in maintaining that territories which have this character in America can, in spite of this doctrine, be so acquired by European countries.⁷¹

⁷¹ See Salomon: "L'Occupation des Territoires Sans Maître" (Paris, 1889), No. 93. Cf. Jeze: "Étude Théorique et Pratique sur l'Occupation" (Paris, 1896), pages 161-165.

It does not come within the limits of this study to determine the meaning that should be ascribed to the phrase "American continent" in that which relates to the question of occupation: i. e., whether it applies only to the great continental mass or includes the adjacent archipelagos, the islands situated at a great distance from the coast but within the American zone, and the polar regions. The eminent geographer, Réclus, treating incidentally of this question, considers the American continent as consisting not only of the great mass of territory with the adjacent archipelagos and islands, but also the islands situated at a distance of less than one thousand kilometres from this group (Réclus: "Nouvelle Géographie Universelle," Paris, 1893, Book XVIII, page 695, and Book XIX, page 786). Happily this question has not arisen with respect to the islands and archipelagos, since the nearest states have annexed them (e. g., the Galápagos Islands by Ecuador; the Lobos Islands by Peru; the Juan Fernandez Islands by Chile, etc.). As to the controversy between the United States and Haiti as to Navassa Island, see Moore, *op. cit.*, Vol. I, Chap. 81, pages 266-267. Regarding the notion of "American continent" which was formed by Spain, it is useful to bear in mind that, when France occupied the Falkland Islands in 1764, the Spanish government claimed that they were subject to its sovereignty because a part of South America. Westlake characterizes this pretension as extravagant ("Études sur les Principes du Droit International,"

This doctrine of occupation has exercised considerable influence over several modern writers of International Law, who, in generalizing it, maintain that it should be a recognized principle that there are no vacant territories in continents inhabited by civilized nations even when these lands have not been occupied.⁷²

On the other hand, the value of the occupation of territory of the character of *res nullius* in the New World has been almost always a matter for discussion in the conferences over the determination of boundary lines, as was particularly the case in the Anglo-Venezuelan controversy already cited.⁷³

Turning again to the policy of "hegemony," although it has not established such incontestable principles of International Law as those comprised in the Monroe Doctrine and the extensions of it which have been accepted by the whole of America, still it gives rise to problems *sui generis* to which we have adverted and which are of great importance.

CHAPTER THIRD

I

In the last third of the nineteenth century, in which the third period of the history we are outlining commences, the political map of Latin America undergoes considerable modifications. Cuba and Panama establish themselves as independent states, the first by emancipation and the second by secession. Brazil changes its monarchical form of government for the republican, and is thereby enabled to come into more intimate contact with the other republics of the New World. Furthermore, the political institutions of nearly all the states have become more firmly established, and in some of them the civil wars have ceased. The most important

French translation of Nys, 1895, page 185). Not long ago the government of Spain, in its arbitral award of June 30, 1865, in the controversy between Venezuela and Holland, as to the Aves Islands, declared that they belonged to Venezuela on the grounds that Spain had formerly considered this island as a part of its dominions, although it had never actually occupied it.

⁷² Fiebre: "Il Diritto Internazionale Codificato," art. 541.

⁷³ See, on this point, Moulin: "L'Affaire du Territoire de l'Acre et la Colonisation interne" in "La Revue Générale de Droit International Public" (1904), Vol. XI, pages 181 *et seq.*

boundary-questions are also settled in this period and even those left pending are nearing a peaceful solution.⁷⁴ Due to immigration, and to the advances made in culture, some of these countries, especially Chile, Brazil and Argentina, have attained a grade of increasing development and prosperity which places them near the level of the best constituted states of Europe.

In their relations with the Old World, the states of Latin America draw the bonds of friendship even closer than in the former period; they negotiate treaties and conventions with the states of Europe, assist at their important international Congresses and conferences, and by their acceptance of the agreements made therein, give them a world character. Their adherence to the resolutions of the First Peace Conference, in which the Permanent Tribunal of Arbitration was formed, and the representation of all of them at the Second Conference, confirm in a most decisive manner the strict solidarity which exists between the two continents.

And in this period, the principal boundary conflicts between the countries of Europe in behalf of their colonial possessions in the New World and the states of America came to an end.⁷⁵ Conflicts of other kinds have been less frequent than in the former period,

⁷⁴ Especially, that between Colombia and Venezuela, which was settled by arbitral decision of the Queen of Spain in 1891; the question of the Missions, between Brazil and Argentina, which, submitted to arbitration by the treaty of the 7th of September of 1889, was decided by President Cleveland, the 5th of February of 1895, in favor of Brazil; that between Chile and Argentina, which, submitted to arbitration by the treaty of the 17th of April of 1896, was ended by the decision of His British Majesty, the 20th of November of 1902 (in regard to this decision and a criticism thereof, see Alvarez: "Des Occupations des Territoires Contestés," in the "Révue Générale de Droit International Public," Vol. X, pages 674-687); also that between Bolivia and Brazil over a portion of the Acre territory, brought to an end by the treaty of Petropolis of November 17, 1903. (On this subject, see Moulin: "L'Affaire du Territoire d'Acre" in the "Révue Générale de Droit International Public," Vol. XI [1904], pages 150-191.)

⁷⁵ The conflict between Venezuela and Great Britain over the boundary of British Guiana, of which we have already spoken; the conflict between Brazil and France over the boundary of French Guiana, also referred to; and that between Brazil and England over the boundary of British Guiana, submitted to the King of Italy for arbitration, by the treaty of November 6, 1901. The decision was rendered June 6, 1904. (For this decision, and a critical discussion of it, see Lapradelle and N. Politis: "L'Arbitrage Anglo-Bésilien de 1904" in the "Révue

though some of them have not ceased to be of importance — among which should be mentioned those of England with Brazil and Nicaragua respectively, in 1895. The conflict with Brazil arose out of the attempt of England to acquire by occupation the island of Trinidad which Brazil had already occupied; and was ended, through the friendly mediation of the Portuguese Government, by England recognizing the sovereignty of Brazil over that island. The trouble with Nicaragua grew out of the imprisonment in that country of a British vice-consul; and it is worthy of mention because Nicaragua proposed by way of settlement to abandon to England the Corn Islands, a proceeding which was, as we have already seen, objected to by the United States. But the most important of all the conflicts of this period has been due to the Anglo-Italian-German coercive action which, in 1902, was exercised against Venezuela, the antecedents and consequences of which, being so recent and well known, need no detailed statement.⁷⁶

II

The moral influence of the United States and its policies upon the entire continent, are worthy of special attention.

At this time, because of the more frequent contact of the Latin countries with the United States, the political life of the latter served them by example and experience in a much more accentuated degree than during the preceding periods. The economic and social problems that arose in that republic, and particularly those peculiar to new countries, such as those relating to immigration and the exploitation of new territories, were observed with interest by the Latin countries, as they found themselves in an analogous situation. So that, in many problems, the experience of the United States pre-

de Droit Public et de la Science Politique" [Paris, 1905], No. 2, and pages 61 *et seq.* of the Supplement [Paris, 1905].) Compare Fanchille: "Le Conflit de limites entre le Brésil et la Grande-Bretagne" in the "Révue Générale de Droit International Public," Vol. XII (1905), pages 25-142.

⁷⁶ It should be remembered, however, that the permanent Court of Arbitration of The Hague, in its decision of February 22, 1904, recognized that Germany, England, and Italy, because of having blockaded the coast of Venezuela, had the right of preference in the payment of the credits which they might establish against that country.

sented the principal if not the only practical solution to the countries of Latin America.

Aside from this moral influence, the activity of the United States in the American continent has a triple aspect.

In the first place, the enormous growth attained in this period has given rise to the most typical cases of the development of the Monroe Doctrine and of the principle of hegemony, as can be easily seen by examining the outline we have traced at the end of the preceding period. We may add here, regarding the new states of Cuba and Panama, that not only has the United States participated directly in their making, but has frequently interfered to an equal extent in their interior political life, because of the civil wars with which those states have been afflicted. And those countries recognize that influence. Thus, article 3 of the Appendix to the Constitution of Cuba recognizes in the government of the United States the right to interfere in the country not only to defend its independence but also to maintain public order; and article 136 of the Constitution of Panama confers upon the same government authorization to interfere in Panama for the purpose of re-establishing order, in the event that the United States should by treaty assume the obligation of guaranteeing the independence and sovereignty of the newly born republic. In this way there is established for the first time in America, the problem of the possibility of completely independent and sovereign States being obliged, because of their inexperience in self-government, to place themselves directly under a kind of political tutelage of the great republic.⁷⁷

Simultaneously with that of hegemony, the United States developed another policy, apparently contradictory but in reality in har-

⁷⁷ This system is worthy of attention, as it is without precedent and is, in our opinion, a welcome innovation as compared with the protectorates exercised by the nations of Europe. By this system, the state over which the guardianship is exercised preserves its qualities of independent and sovereign state; but, in case of grave disturbance of the internal political order, and under certain conditions in foreign relations, the United States intervenes directly in the first case, and limits the exterior sovereignty in the second. This almost tutelar system, which does not, like the protectorate, offend the dignity and national spirit, will gradually disappear in proportion as the progress of the new states renders it unnecessary.

mony with it. This country has realized that the continental solidarity of America should not be confined to the defense of the independence and integrity of the new states as against Europe, but should also extend to the broadening and strengthening of the bonds which naturally exist between all the countries of the New World by virtue of their similarity in interests and problems resulting from their situation in the same continent, a continent different in its conditions from that of Europe.⁷⁸

For the treatment of these special interests and problems, that is to say, for the widening of the field of American continental solidarity, the United States has reunited and continues reuniting all the countries of the New World in International Conferences. It will be useful to trace, briefly, the proceedings of these conferences in order to see up to what point they have attained the primordial object which was sought by means of them, or other objects entirely different.

III

In 1881, the Secretary of State, Mr. Blaine, alarmed at the increasing strength of commercial intercourse of the Latin states with Europe, and at the same time convinced of the advisability of reacting against the policy of isolation which had existed up to that time between his country and Latin America, saw fit to invite those countries to a Pan-American Conference. This Conference was to be held in Washington in 1882, and its object was to adopt means for preventing wars among the American states. The meeting had to be indefinitely postponed because of the War of the Pacific. However, the Government of the United States persisted in the project initiated by Mr. Blaine. By the law of June 7, 1884, an investigating commission was formed, for the purpose of finding out

⁷⁸ This policy should not be confused with the efforts made by the United States to increase its commerce in Latin America, for these efforts are characteristic of all countries. There is undoubtedly, however, an intimate relation between the two policies of the United States. Mr. Rowe, in his article on "The Danger of National Isolation," published in *The North American Review*, June, 1907, pages 420-425, has clearly set forth the obstacles still in the way of a satisfactory commercial approximation between the United States and the Latin-American countries.

the best means of fostering the international and commercial relations of the United States with the rest of America. The commissioners were to find out if the Latin-American governments were disposed to enter into treaties of commerce with the United States and to meet with it in a conference where matters of common interest to all America should be discussed. The result of their investigation was entirely favorable to both ideas.

The 24th of May, 1888, the Congress of the United States passed a law authorizing the President to invite the American states to a conference which should be held in Washington the following year. The subjects to be considered in the conference, as set forth in this law, were many and of transcendent importance. Among others were the following relative to the states of America: the formation of a customs union; the establishment of regular and frequent communications between the ports of the different countries; a uniform system of customs duties; the adoption of a uniform system of weights and measures and of a common silver currency to be issued by each government; legislation regarding sanitation and regarding copyrights; and finally, a plan for the arbitration of all questions that might arise between those states.

The idea of the calling of a Pan-American Conference was diversely appreciated in America;⁷⁹ but in Europe the announcement caused a sensation. Opinion was unanimous in the belief that the United States sought by this means to dominate in the New Continent and that the conference was the first step towards that domination.⁸⁰ The states of Latin America, understanding the importance that the projected reunion had for them, accepted the invitation and sent representatives, with the exception of Santo Domingo. By a special law of the United States, after the opening of the Conference, Hawaii was invited to participate therein, and sent a delegate.

The assembly opened its sessions the 2nd of October of 1889,

⁷⁹ See a methodical resumen of the opinions of the press of the United States, in A. Prince: "Le Congrès des Trois Amériques" (Paris, 1891), pages 12-34.

⁸⁰ A. Prince, *op. cit.*, pages 45-68; also Pradier-Fodéré: "Amérique Espagnole," in the "Révue de Droit International et de Législation Comparée," Vol. XX (1888), page 515.

and discussed in detail nearly all the subjects on the programme. The characteristic of this assembly is that instead of subscribing conventions it voted recommendations. These recommendations were of three classes: those of continental interest which aimed to draw closer the bonds naturally existing between the states of America because of their situation on the same continent, and to settle uniformly, as far as possible, the principal international problems common to all of them and derived from the very fact of their being so situated (Pan-Americanism); others of interest to only the states of Latin America (Latin-Americanism) and tending to prevent certain abuses of the European countries in their relations with those states; and the third tending to procure agreements between all the states of America on matters of universal interest, but on which a universal or world agreement was not yet possible.

In the first category belong those relating to the conclusion of treaties of commercial reciprocity; the routes of communication between the American states by way of the Pacific, the Atlantic or the Gulf of Mexico and the Caribbean Sea; the navigation of American international rivers; the construction of a Pan-American railroad; the establishment of an American International Bank; the adoption of a common silver currency for all the nations of America; the establishment of a Commercial Office of the American Republics; and finally, the prevention of conquests and grants of territory in America.

The second category comprises recommendations tending to correct the abuse of diplomacy for the purpose of pressing foreign claims.

The third comprises the adoption of the metric decimal system; the convenience of a common nomenclature of merchandise and uniform customs regulations as to the valuation and classification thereof, port rights, consular rights, sanitary regulations, extradition, arbitration, and, above all, the questions of private International Law discussed in the Latin-American Congress of Montevideo in 1889.

It is not our present object to study in detail all these separate recommendations and the principles from which they were derived. It is, however, well for us to call attention to the most important.

The question of arbitration, which has so often aroused the enthusiasm of the Latin states of America, was the one most fully discussed in the congress; and the final resolution reached was that the governments represented in the congress should be urged to conclude a uniform treaty in conformity with a project which was set forth under date of April 17, 1890. In this project it is stated that the republics of America adopt arbitration "as a principle of American International Law for the solution of difficulties, disputes or contests between two or more of them" (article 1); this arbitration to be obligatory, permanent and general, that is to say, for all manner of controversies, excepting only "those questions which, in the exclusive judgment of one of the nations interested in the contest, compromise the independence of that nation; in such case, the arbitration will be voluntary on the part of that nation, but will be obligatory for the other party" (articles 2 to 5). This exception, as is seen, destroys the rule. Under arbitration remain included the questions pending at the time of the Conference (article 5). The treaty may be adhered to freely by all the nations that so desire (article 19). This project on arbitration, in its scope, had no precedent in the diplomatic history of the world, and was adopted, not without certain opposition to some of its articles on the part of various countries, especially Mexico. The delegation of Chile, because it considered that the project was Utopian and that it directly affected pending questions of the War of the Pacific in which Chile had a special interest, opposed it vigorously, with an extensive declaration of motives for so doing, maintaining that while arbitration was commendable for stipulated cases, situations and countries, it was not commendable in its general and obligatory character in the actual state of international society. For these reasons that delegation, representatives of a country which, far from being averse to arbitration, on the contrary was perhaps one of those that had agreed to and practiced it most in America, refrained from taking part in the discussion and adoption of the project referred to.

In addition to approving this project on arbitration, the conference expressed the hope that the controversies between European

and American nations might be decided by the same means, recommending to the governments represented in the Conference that they communicate this resolution to all friendly powers.⁸¹

In the resolution adopted regarding diplomatic claims, it is established that foreigners have the same rights civilly as the citizens of the nation, and that they can exercise those rights in the same manner as the citizens. It is declared, furthermore, that the American nations have not, nor do they recognize, in favor of foreigners any other obligations and responsibilities than those which by their laws they have towards their own citizens. The delegation of the United States of North America refrained from voting on this declaration.

On the subject of conquests, the adoption of the following declarations was recommended:

1. The principle of conquest is eliminated from American Public Law, for as long as the treaty on arbitration remains in force.
2. The grants of territory which may be made during the time that the treaty on arbitration subsists, shall be null if made under menace of war or because of force of arms.
3. The nation making such grants shall have the right to demand that their validity be decided by arbitration.
4. The renunciation of the right to demand arbitration, if made under the conditions set forth in article 2, shall be without value or efficacy.

With only one exception all the delegations, including that of the United States, voted in favor of this resolution. The delegation of Chile, however, refrained from voting because that resolution, like the project of arbitration, directly affected pending territorial questions.

The immediate result of this First Conference was the signing in Washington, the 28th of April of 1890, near the close of the sessions, of a treaty of arbitration on the model approved by the conference on the 17th of the same month. This treaty was subscribed to by one-half of the countries represented in the assembly: United States, Haiti, Guatemala, El Salvador, Honduras, Nicaragua, Ecuador, Bolivia, and Brazil, but was not ratified by them.

⁸¹ The governments of Europe to which this desire was communicated by the United States did not attach great importance to the invitation.

IV

The idea of the Pan-American Conferences was among those destined to grow gradually as time passed and as the states of America entered freely on the way of progress; but it was necessary that those conferences should be convened on other bases.

Blaine, the originator of the conferences and the preparer of the first of them, ignoring their natural object and scope, committed a fatal error in aiming, through that first assembly, to tie up hurriedly and immediately the interests, and especially the economic interests, of the United States with the rest of America. This error was the more inexcusable in as much as there did not exist between those two groups of countries the mutual understanding, morally and intellectually, which is indispensable to the existence of an effective union of this kind.

Profiting by the experience gained in this first conference, the programmes of the second and third, which took place in 1901-1902 and 1906, in Mexico and in Rio Janeiro respectively, excluded those projects which had been found Utopian in character or difficult of realization, thus limiting the discussions to subjects of a more practical nature.

In the Second Conference, as in the first, arbitration was the theme that most occupied the countries therein represented, and this was due, as formerly, not only to the love of the principle itself, but also to the interest that certain countries had in bringing moral pressure to bear on Chile to secure the settlement by arbitration of the question pending between that country and Peru. On this occasion, Chile was again the champion to oppose obligatory and general arbitration and to argue in favor of voluntary arbitration such as had been approved a short time before by the First Hague Conference. The United States having declared itself in favor of the same idea, the states of America agreed unanimously to concur in the resolutions of the Hague Conference on this subject, thereby giving them the character of world-resolutions.⁸²

⁸² While adhering to the conventions of the Hague Conference, and consequently, to the "voluntary arbitration" established in one of those conventions, the delegates of nine countries — Argentina, Bolivia, Santo Domingo, Guatemala,

In view of the disproportionate importance that special interests had given to the question of arbitration in the two Pan-American Conferences, it was agreed to eliminate this topic from the programme of the Third Conference, in order to give adherence to whatever might be resolved in that respect by the Second Hague Conference to which all the states of America were invited.

In the Second and Third Conferences, conventions were subscribed and resolutions adopted which are of positive importance in the international politics of America. The conventions subscribed, either in both conferences or in one or other of them, were the following: codification of International Law; claims for injuries and pecuniary damages; rights of foreigners; condition of naturalized citizens who resume their residence in the country of their origin; adhesion to the conventions of the First Hague Conference; exercise of the liberal professions; protection of literary and artistic works; patents of invention, drawing and industrial models, trade-marks and brands; extradition and protection against anarchy; and interchange of publications.

The recommendations or resolutions treated of the following questions: Pan-American railroad; establishment of a Pan-American bank; public debts; the calling of a customs house congress; publication of the statistics of the respective countries; preparation by each country of a detailed study regarding its monetary system; measures for facilitating international commerce; reorganization of the International Office of the American Republics; creation in that office of a special section for commerce, customs and commercial statistics, and of a special service destined to facilitate the improvement of the natural resources and the means of communication in the various

El Salvador, Mexico, Paraguay, Peru, and Uruguay — subscribed, under date of January 29, 1902, that is to say, three days before the close of the First Conference, to a general treaty of obligatory arbitration, in which the parties bound themselves to settle in that manner all controversies existing or that might arise between them, provided, however, that said controversies affect, in the exclusive judgment of one of the interested nations, neither the independence nor the honor of the nation (art. 1). It is agreed, further, to submit to the Permanent Court of Arbitration of The Hague all the controversies to which the treaty refers, unless one of the parties prefer that a special jurisdiction be organized (art. 3).

countries; commercial relations; sanitary police; the calling of a congress for the study of the production and consumption of coffee; creation of an international archeological commission; creation of special sections, dependent on the departments of foreign affairs of the various countries, to facilitate the realization of the agreements and resolutions of the Pan-American Conferences; and, future international conferences.

Of the conventions approved in this Conference, the one most worthy of note is that aiming at the codification of International Public and Private Law, because once carried out, it will be a great step toward the uniformity of international relations in America, while at the same time having a decisive influence in International Law. Another great step in the direction of drawing closer the relations between the states of the New World, is the perfecting and widening of the attributes of the International Office of American Republics created by the First Conference. This institution already does splendid work, furnishing to all these republics *data* required regarding any one of them.

The conventions subscribed in the Conferences of Mexico and Rio Janeiro, have already been ratified by a number of states; and the measures adopted recently by the Third Conference to obtain that ratification⁸³ give grounds for the hope that they may be accepted in the near future by all the nations of America.

v

It is not within the limits of this present article to examine or set forth the principles contained in all the conventions and resolutions adopted in the Second and Third Pan-American Conferences.

Certainly, however, we should note that in the conventions of a universal character, in which a general or world agreement is not yet possible (such as, literary and artistic copyrights, trade-marks and brands, extradition, and some other questions of International Pri-

⁸³ Above all, the resolution recommending the creation of special sections dependent on the departments of foreign affairs of the respective governments, which should have for their object, among others, to urge the approbation of the conventions approved in those assemblies.

vate Law), the articles therein have not been founded on idealistic principles, but have been framed rather in accordance with the principles and practices accepted by European states in similar conventions.

But the conventions approved by the First Hague Conference are those that exerted the greatest influence upon the Pan-American assemblies. In the Conference of Mexico, it was agreed to recognize the principles established in the three conventions of that Hague Conference dated July 29, 1899, "as part of the American International Public Law." At the same time, the governments of the United States and Mexico were delegated to treat with the other powers signatory to the "Convention for the peaceful settlement of international conflicts" to permit the adhesion to that convention of any non-signatory American nations that might so desire.

In so far as concerns the subjects of Pan-American character arranged in the Second and Third Conferences, they were settled, as must inevitably have been the case, in conformity to the necessities and special conditions of the countries of America. And the settlement of these questions is of considerable importance, as it will not only tend to facilitate the relations between all these countries, but will also show to the countries of Europe the extent to which the New Continent has problems distinctively its own.

And as for the resolutions on subjects of Latin-American character, they have had for an object the prevention of certain abuses that the European countries commit against the Latin republics of this Continent.

In this connection, the Second Conference, on the proposal of the delegation of Chile, approved a project of a convention in which it was declared that foreigners have the same civil rights as the citizens of the nation, and that the states have no other responsibility towards foreigners than that which they have, according to their constitution and laws, towards their own citizens. It was further stated that when a foreigner has cause for complaint against a state, he should establish that claim before the proper tribunal of that same state, and should not be allowed to make claim through diplomatic channel except in extreme cases of a denial of justice or unwarranted delay

or open violation of the principles of International Law. The United States refrained from subscribing to this convention.

The Argentine Republic, for its part, because of the coercive Anglo-Italian-German action against Venezuela in 1902, manifested in a famous communication of its Minister of Foreign Affairs to its Minister Plenipotentiary in Washington, its desire for the recognition of the principle that a "public debt does not justify armed intervention, nor even the actual occupation of the territory of American nations by a European power." This point was included in the programme of the Third Pan-American Conference which recommended to the Governments represented to consider whether the Second Peace Conference should be invited to examine this case of forcible collection of a public debt and, in general, measures tending to lessen conflicts of exclusively pecuniary origin between the nations.

In the Hague Conference that doctrine caused a sensation because it was believed that the Latin-American States sought by this means to evade the payment of their financial obligations. The convention subscribed to in that assembly by all the powers establishes, in its first article:

The contracting powers agree not to have recourse to armed force for the recovery of contract debts, claimed from the government of one country by the government of another country as being due to its nationals. This undertaking is, however, only applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any "compromis" from being agreed on, or, after the arbitration, fails to submit to the award.

In our opinion, the Drago Doctrine has by no means the American interest that has been ascribed to it, since the failure of payment of financial obligations is not a characteristic of the states of this Continent.

That doctrine is, besides, either superfluous or defective, according to the object in view. It is superfluous if it seeks (as is stated in the note of the Argentine Government, in 1902, and as the author of the doctrine has himself declared⁸⁴) to prevent the European

⁸⁴ Drago: "Les Emprunts d'État et leurs Rapports avec la Politique Internationale" in the "Révue Générale de Droit International Public," Vol. XIV, pages 270-272.

states from gaining possession of any portion of the American continent, because the Monroe Doctrine had already established that point. And if its object was to prevent the European states from bringing pressure to bear upon the Latin-American states to force them to submit to their demands before said demands have been declared justified by arbitral award (which of a certainty would be of American interest), then the doctrine is defective because it has not adopted this general formula, but on the contrary has referred only to a special case.⁸⁵

⁸⁵ For the reason already mentioned, we can not accept the opinion sustained by a distinguished European publicist that the Drago Doctrine is the indispensable complement of the Monroe Doctrine because it aims at the financial independence of the states of the New World and consequently the refusal to recognize the former would be equivalent to a refusal to recognize the latter. (See Moulin: "La Doctrine de Drago" in the "Révue Générale de Droit International Public," Vol. XIV, pages 417 *et seq.*)

Early in 1906 we declared our opinion that the Drago Doctrine, examined from the purely doctrinal standpoint, was too absolute. We justified our objection in the following terms: "Intervention, armed or otherwise, against a *bona fide* state, is inadmissible when it has for sole object to exact payment of a public debt, or the fulfillment of any compromise whatsoever, much more so when it aims to compel the State to recognize obligations not in accordance with International Law. * * * Against such States, claims should be made always in accordance with the procedure established by International Law. Furthermore, in dealing with those that act in bad faith, or that through their own fault find themselves unable to satisfy their obligations, or that cause or permit to be caused injuries to foreigners, compulsory measures are admissible, but only after all diplomatic means have been exhausted. A State may be said to act in bad faith only when, without plausible excuse, it refuses to pay debts liquidated or places obstacles in the way of the liquidation of a debt arising from a convention, from arbitral award rightfully pronounced or from the principles of International Law universally recognized."

In regard to the antecedents of the Drago Doctrine and the criticisms and opinions thereon, see the work "La Republica Argentina i el Caso de Venezuela," by Luis M. Drago (Buenos Aires, 1903), and the Appendix to this work published in 1906. Compare Basdevant: "L'Action Coercitive Anglo-Germano-Italienne contre le Venezuela" in the "Révue Générale de Droit International Public," Vol. XI, pages 362-458. The writings in this last period have been most numerous. That question has been the subject of an important discussion in the annual meeting of the "American Society of International Law" of 1907 (Proceedings of the American Society of International Law at its First Annual Meeting, pages 100-149).

VI

Although the conventions approved in the Pan-American Conferences have not yet been ratified by all the states of America, those conferences have brought about the results which assemblies of their character are destined to produce. In short, these conferences have led to results which are no less far-reaching, and are not without great importance. In the first place, they make known the international political psychology of the states of America, that is to say, the problems which most particularly concern those states and the means they judge best suited for their solution; and also, to what extent those states are able to agree, whether in matters of a world character or matters that affect only their immediate interests. Furthermore, these conferences have contributed powerfully to the development and foundation on correct principles of an *American consciousness*, a consciousness which is one of the characteristics of the political life of the states of the New World. And finally, the resolutions subscribed to in those assemblies are rules of International Law in the making, for they prepare and accentuate public opinion on the subject of which they treat, and not only acquire a considerable moral authority, particularly when confirmed by several conferences, but also serve as models to be used by the states for their future pacts.⁸⁶ Thus these resolutions, because of the uniformity they establish in opinions, practices, and tendencies, tend to facilitate the codification of International Law. Once ratified by the states of America, the conventions approved in those assemblies will be precepts for which the public opinion has been prepared, and which will exercise, because of the number of states that observe them, a considerable influence in the progress of the Law of Nations.

VII

The contemporary international life of the Latin states of America is characterized by an ardent desire for peace, and by the develop-

⁸⁶ The Latin-American states have concluded, since those conferences, numerous conventions among themselves on the subjects treated therein, which are modeled very closely after the conventions of those conferences. In this there has been a real abuse, for the conventions subscribed to in the conferences have for their object to unite all the states in one single convention.

ment of an *American consciousness*. Their aspiration towards peace is manifested by the clause they insert in the treaties of commerce that they conclude imposing mutual obligations upon the parties by the numerous treaties of general arbitration which nearly all of them have recently concluded, and likewise by their submitting to this peaceful method of settlement all the conflicts that have arisen and that have been capable of being resolved in this manner. [The first treaties of general arbitration were celebrated in 1872 by the Central-American Republics among themselves.⁸⁷]

The Argentine Republic is the state that has concluded the greatest number of treaties of general obligatory arbitration. On the 23d of July, 1898, it celebrated the first of that nature, and of such scope that it caused a sensation in the political world as it established no exception whatever to the conflicts which should be decided by that means. It has not been ratified. Since that date, the same nation has concluded various treaties of a like nature though not so ample as that first one.⁸⁸

Inspired by that same desire for peace, Chile and the Argentine Republic concluded, on May 28, 1902, a pact on the limitation of naval armaments⁸⁹ (completed by the Additional Acts of June 24 and July 10 of the same year and by the protocol of January 2, 1903), which aimed to render effective a prudent equality. That pact, because of its aim and scope, and also because of its having been entered into when the two countries were at the point of breaking

⁸⁷ On December 20, 1907, the five republics signed in Washington a general treaty of peace and friendship, by virtue of which they bound themselves to decide all disagreements that might arise between them, by means of a "Central American Court of Justice" established by convention of that same date. They likewise subscribed to a treaty of extradition and another on the establishment of a Central American International Office. (The texts are given in the Supplement of this JOURNAL, Vol. 2, pages 219-265.)

⁸⁸ With Uruguay, June 8, 1899, and additional December 21, 1901; with Paraguay, November 6, 1899, and additional January 15, 1902; with Bolivia, February 3, 1902; with Chile, May 28, 1902; and explanatory act of July 10, 1902; with Brazil, September 17, 1905; and with Italy, October 12, 1907; these last two not yet ratified.

⁸⁹ See Supplement, Vol. 1, page 294; and for the protocol of January 2, 1903, see *idem*, Vol. 1, page 297.

off diplomatic relations with each other, is famous in the history of International Law.⁹⁰

But this aspiration of the American states towards peace is not by any means a "pacifismo a outrance." They realize that because of their geographical situation and their economic conditions, they may possibly be involved in grave conflicts with the countries of the east and west. Therefore, they seek to increase their army and navy, and consider themselves obliged to adopt, although with less intensity than the European states, the policy of armed peace.

Furthermore, in America, united by the gradually increasing contact between the states and by the work of the Pan-American Conferences, the lack of such antagonisms as exist among the countries of Europe (though there have been some differences between these states) has caused the foundation on a new basis of the consciousness (which, since the time of their emancipation, all these states have had) of the existence in America of a double solidarity: the continental and the Latin-American. Until the last third of the nineteenth century, continental solidarity referred, as we have seen, only to points contained in the Monroe Doctrine. Latin-American solidarity, based on the fact of the common origin of all the Latin states of America, sought the formation among those states of a complete or at least a partial confederation which would draw closer the bonds created by that common origin. At the present day, the field of continental solidarity (Pan-Americanism) has widened, embracing all the problems of the states of America which arise from the fact of their situation on a continent distinct from that of Europe. The Latin-American solidarity (Latin-Americanism), in turn, has been restricted, losing its Utopian character and confining itself to those problems derived from or connected with the common origin of the constituent countries. Latin-Americanism thus reduced has had the two tangible manifestations we have already seen, in the international conferences; but, in its scientific aspect, it has been manifested in the holding of three Scientific Congresses, in 1898, 1901, and 1905,

⁹⁰ Those same sentiments, which both countries had before exhibited, inspired a treaty on boundaries, of July 23, 1881, which in article 5 declares the Magellan Straits forever neutral. See Supplement to this issue of the JOURNAL, p. 121.

in Buenos Aires, Montevideo and Rio Janeiro respectively. Those assemblies, while treating of various affairs of special interest to those states,⁹¹ have also served to bring into contact their intellectual elements and scientific centres.

In so far as concerns Pan-Americanism, the United States has realized that, in order that it should have a solid foundation, the holding of international conferences is not enough, but that it is necessary to destroy the distrust that the Latin states have of its policy in America, a distrust which is, furthermore, an imminent danger not only for the economic interests of that republic, but also for its foreign policy, which would be that of isolation on the continent.

Therefore, in obedience to the conviction that the exercise of the principle of hegemony is one of the causes of that distrust, the United States desires, or at least shows itself not unwilling, that the better constituted Latin states should share with it, in proportion to their strength, the exercise of that hegemony in the matter of the safeguarding of the interests of the American continent. The hegemony would thus be modeled after the European "balance of power" and would be extremely beneficial to America.⁹²

Furthermore, understanding that the bonds of friendship and of intellectual intercourse are the precursors and at the same time the most solid bases of good relations, it has endeavored to establish

⁹¹ The most important common problem is that relative to the unification of Civil Law. This problem does not present great difficulties, taking into consideration the sources from which the laws of those countries have been drawn.

In the Third Scientific Congress we had occasion to consider this subject.

We should mention here, also, the doctrine which a distinguished Ecuadorian Plenipotentiary, Doctor Tobar, has formulated for the purpose of preventing civil wars in the Latin countries of America. In his opinion, the best means of securing this object would be that those countries should all bind themselves not to recognize governments *de facto* born of a revolution. This idea of preventing civil wars, we have seen, has been one of the considerations of the Latin states of America in the congresses which they held in the first period of their history; and the resolutions adopted in this respect in some of those congresses appear to us more acceptable, as they are less absolute, than those of Doctor Tobar.

⁹² This American cooperation would replace advantageously the doctrine of "international police," according to which it would devolve upon the United States to see that the Latin states of America comply promptly with their obligations toward the states of Europe.

those bonds with the Latin countries of America. To this object was due the visit which the Secretary of State, Mr. Root, made to the principal republics of the New World at the time of the Third Pan-American Conference. His visit has been followed by others of distinguished North American politicians and scholars who have placed the universities of their country in constant communication with those of Latin America.

Although there are still obstacles in the way of the full development of Pan-Americanism, it is gaining ground rapidly, especially with the directing and intellectual class in the New World, and there is every ground for hope that within a very short time the term America may be recognized not merely as a geographical expression, but as the symbol of a New Continent of which the constituent states, free from antagonisms, are closely bound together, by interests of every kind.

We feel sure that the First Pan-American Scientific Congress, to be held at the end of the present year [1908] in Santiago, Chile, will also contribute powerfully to the tightening of those bonds of mutual understanding. Furthermore, in view of the object of that Congress, which is exclusively the study of continental problems in all branches of activity, it will not only manifest and develop an *American mentality*, but will also help to make more fruitful the labor of future Pan-American Conferences.

Pan-Americanism counterbalances Pan-Saxonism, Pan-Latinism, and Spanish-Americanism, in the sense that both the United States and the Latin states of America feel themselves more closely bound to each other than to the other countries of their same respective origins.⁹³

⁹³ Pan-Americanism counterbalances particularly Spanish-Americanism, though that does not mean to say that there exists between the two any irreconcilable opposition.

Spain has sought for some time, for political and economic reasons, to create a close unity of interest between itself, Portugal, and the countries of Latin America. In fact, there has been formed in Madrid a powerful scientific society aiming at that object. In the same city, under the auspices of the Spanish government, two international congresses have been held which have sought the same ends. In 1892, in connection with the celebration of the Fourth Centennial of America, a Spanish-American Juridical Congress was held, in which

We will observe, finally, that two extreme errors are to be guarded against in the concept of Pan-Americanism and Pan-Latinism. In the first place, not only are these two ideas not antagonistic to each other, but they do not even oppose in any way the solidarity and increasing growth of common interests existing between the states of the New World and those of the Old. At the other extreme, neither do those concepts imply the existence of any absolute solidarity between the countries of America, especially from the standpoint of foreign policy, and, above all, for the support of a state that causes international complications because of its improper proceedings. Such a view, besides being without any plausible foundation, would be extremely detrimental to the good fame and prestige of the states of the New World.

The foundation and object of both solidarities is much more praiseworthy: to strengthen the relations naturally existing between the states of all America or between the Latin group of states, and due, in both cases, to the situation of those countries in the American continent; to study the common problems arising out of that situation, and to endeavor to solve them uniformly in order to pursue a policy in conformity with their common interests.

CHAPTER FOURTH

I

In the preceding chapter we have seen in what way the separation of Latin America from the mother country worked changes in the international community: it not only added new states with the similar constitutional characteristics to those already existing, but had a marked influence upon the rules governing these states because of the peculiar phenomena attending the development of these new

various important matters were discussed, especially arbitration. In 1900, a "Spanish-American Social and Economic Congress" was held, the object of which, plainly stated, was to draw closer the bonds of every kind, and especially the economic, between the Spanish-American peoples. That assembly followed very closely the programme of the First Pan-American Conference, even going so far as to propose the establishment of a Spanish-American Bank. (*See "Congreso Social y Economico Hispano-Americano,"* two volumes, Madrid, 1902.)

members of the community.⁹⁴ Now let us see briefly the nature of this influence.

It has consisted: in the application, to international relations, of principles opposed to those obtaining at that time in Europe, and which existed only in the theory of philosophers and writers or in the ideas of the French Revolution; in the generalization of principles which were barely recognized at that time in Europe, appearing in conventions entered into by one or two European states; in the development of problems *sui generis* or problems distinctively American; in the uniform regulation of matters of especial interest to these Latin-American states; and, finally, in the uniform regulation of questions of universal interest but on which a universal agreement is not yet possible.

In regard to the first category, we have seen that the Latin-American states, at the beginning of the nineteenth century, in the same way as the United States at the end of the eighteenth century proclaimed and sustained by arms their right to independence from the mother country and to treatment not as rebels, but as belligerents. They proclaimed, furthermore, with the United States in the Monroe Doctrine, the liberty of all the states of America as a whole; that is to say, that they should not be subject to the interference of the European states; and at the same time, that the New World should not be considered open to colonization because the whole of it (even the regions unexplored and consequently, according to the principles then dominant, *nullius*) was already subject to the sovereignty of independent states.⁹⁵

The equality of all the states of America was also recognized, in the sense that there should exist among them no political pre-eminence.

⁹⁴ There has not been sufficient study given to the influence exerted by the discovery and conquest of America on the community of nations, especially in the development of the Law of Nations. In regard to this last, see Fernandez Prada: "Influencia del Descubrimiento y Conquista de America en el Derecho Internacional" in his "Estudios de Derecho Internacional," Madrid, 1901, pages 141-213.

⁹⁵ Not only do no territories "*nullius*" exist on the American continent, but further, and in consequence thereof, no international value is given to the pos-

All these principles of independence, liberty, and equality of the American states, happily synthesized in the Monroe Doctrine of which the United States as the most powerful of those countries constituted itself the defender, were proclaimed at a time when attempts were being made in Europe against their liberty and independence by means of interventions, and when the equality of the states was denied by the system of the "balance of power" which was shared in by only the great powers.

From the time of their proclamation, those principles have been the basis of the international relations of the states of the New World, the basis, consequently, of what may be called "American" International Law. Those states, furthermore, contributed greatly towards the incorporation of those principles, later on, in "General" International Law.

The Latin States of America also gave an example of international fraternity by joining together in conferences for the adoption of measures best calculated to maintain peace among them and for the development of their reciprocal relations. In those congresses they proclaimed two new principles, which were also opposed to those that up to that time had obtained in the general community of nations, and of which the United States, as in the case of the Monroe Doctrine, constituted itself the defender: the purpose of the enunciation of these principles was to prevent the states of Europe from acquiring by any means whatsoever, even with the acquiescence of the American countries, any portion of the territory of these countries, or these latter countries from placing themselves under the protectorate of a foreign state; and, secondly, to prevent the occupation, more or less permanent, of any portion of the territory of an American country by any state of Europe, even by title of war.

session of certain regions held since time immemorial by native tribes not recognizing the sovereignty of the country within whose limits they find themselves. Two important consequences follow therefrom: that the occupation of those regions by the natives is a matter of internal public law of each country and not of International Law; and second, that the governments have, in certain cases, an international responsibility for the acts of the natives within their boundaries, even though those natives do not recognize the sovereignty of the state.

These principles, not yet recognized in "General" International Law, lie at the basis of the structure of "American" International Law.

There has also been a desire on the part of some to proclaim as a principle of "American" International Law the territorial integrity of the states of the New World exactly as they were when they freed themselves from Spanish dominion — nullifying, in consequence, territorial secessions and annexations. But this has been no more than a noble ideal, and has not been given any practical application in the diplomatic history of America.

The second contribution of the Latin states of America to the development of International Law, has been to proclaim and generalize certain international principles or rules which had only barely made their appearance in Europe in the agreements of some few states, such as, the freedom of the seas, commercial liberty, the abolition of the slave-trade; the declaration that the states should adopt adequate means tending to prevent the organization in their respective territories of expeditions aiming at the disturbance of the public order of another state; with respect to the rights of the individual in his person, beliefs, and property; equality between citizens and foreigners in the acquiring and enjoyment of civil rights; no extradition for political offenses; the fixing of a certain time to elapse and formalities to be gone through prior to the declaration of war; the restriction and humanizing of war by land and sea, and especially the elimination from the international concept all conflicts not between states; the prohibition of the sacking of the towns and strongholds of the enemy even when taken by assault; facilities for neutral commerce; abolition of privateering; declaration that the neutral flag covers enemy's goods except contraband of war, and that blockades are not binding unless effective. These last three principles proclaimed in America as far back as 1848 were not recognized by all the states of Europe until the Treaty of Paris of 1856.⁹⁶

⁹⁶ Consequently, some American countries, in replying to the invitation to adhere to the resolutions of the Congress of Paris of 1856, stated that they had no difficulty in accepting because those resolutions were already forms of their foreign policy and incorporated in conventions already celebrated by them.

But the principle which they have most extensively proclaimed and systematically practiced before its acceptance by Europe, is the employment of peaceful means to prevent or settle international conflicts. The states of Latin America not only have proclaimed the principle of arbitration in their international conferences, and stipulated it in numerous conventions and practiced it in the conflicts in which they have found themselves involved,⁹⁷ but some of them have even established it in their constitutions. In fact, some constitutions declare that arbitration shall be stipulated in treaties as the means of avoiding conflicts (e. g., Constitution of Venezuela article 120; of Santo Domingo, article 101); others provide that before resorting to war this pacific means of solution shall be tried (e. g. Constitution of Santo Domingo, article 101; and of Brazil, article 34). In the matter of arbitration, the reciprocal influence of Europe and America is also worthy of note.⁹⁸ In the Second International Pan-American Conference optional arbitration was supported on the grounds that it was the result reached by the countries of Europe on this point. And in Europe, on the other hand, the policy of the American states has been cited as an argument in favor of obligatory arbitration.

In regard to the third and fourth classes of the contribution of the Latin States of America to the development of International Law — these are to be found in the train of problems *sui generis* that have grown out of civil wars and boundary disputes, of immi-

⁹⁷ The Latin states have chosen as arbiter in their conflicts, governments of Europe, and rarely governments of America. This is due principally to the fact that they expect to find in those governments real impartiality and grounds for respecting their award. In conflicts between American and European states, only once has a Latin-American government been chosen arbiter,—in the conflict between England and the Argentine Republic occasioned by damages claimed by the former from the latter because of the closing of the port of Buenos Aires to six English merchantmen which had touched at Montevideo, which port had been declared blockaded by the Argentine government. By virtue of the stipulation in the protocol of July 15, 1864, the question was submitted for arbitration to the government of Chile, which, after hearing the *dictamen* of the Supreme Court of Justice, rendered its decision on the 1st of August, 1870.

⁹⁸ Regarding arbitration in Latin America, see Toro: "Notas Sobre Arbitraje Internacional en las Republicas Latino-Americanas" (Santiago de Chile, 1898); also Quesada: "Arbitration in Latin America" (Rotterdam, 1907).

gration and the attraction of European capital (which we have already had occasion to mention) the creation of situations distinctively American, among which the principal and most characteristic is the hegemony of the United States in the New World.

The fifth and sixth forms of contribution are of no less consequence than the preceding. A perusal of the conventions and resolutions subscribed to in the Pan-American Conferences will suffice to enable one to form an idea of the number and importance of those that refer exclusively to American interests, and of those that refer to matters of general interest on which a world agreement is not yet possible.

II

Not only has the contribution of Latin America to the development of International Law been of vast proportions, but the manner in which the contribution has been made has also been of the most important consequence to that same law. It has shown, in fact, most clearly that although the general community of nations possesses solidarity and recognizes the same international precepts, those precepts are not always universal, that is to say, they are not applied in all cases and in like manner on both continents. The difference between the origin and international development of the Old and New Worlds has brought about, as a necessary consequence, that there have been and are still some precepts of International Law universally recognized by the states of Europe, which, however, are not applicable to the American continent; furthermore, that there are on this continent problems *sui generis* in character, or distinctively American; and that the states of the New World have regulated by conventions subscribed to by all of them, matters of interest to them alone; and, finally, that those states have been able to settle in the same way questions of universal interest but which have not yet been thus regulated by the states of Europe.

These differences, far from destroying the universal community of nations, on the contrary strengthen it, because they place it on its proper bases in as much as they reflect the differences that exist between the constituent elements of that community. To pretend that

all the states that form the community of nations should be always governed by the same identical rules, would be equivalent to a denial of the right of groups of nations of special origin and geographical situation to develop in conformity to their nature when they are able to so develop without destroying any of the fundamental principles on which that community rests. Nor can it be said that this thesis runs counter to the general tendency of modern society in the direction of international solidarity, for this solidarity does not mean that they should always be governed by the same unvarying rules, but rather that they should all observe those rules which permit them to develop individually, each in accordance with his best interests. Nor can an objection be raised at this point on the ground that it is impossible to admit the existence of a separate International Law for each continent, one American and the other European; in truth, we have already seen that the doctrines of International Law, especially the fundamental ones, are fully accepted by both hemispheres as being the fruit of a common civilization. So the question is not as to whether two independent systems of law should be recognized but one quite different. Starting from the basis of the unity and universality of International Law, the problem is only how to correct the unconditional and absolute character of some of its doctrines.

Out of these five groups of questions which exist only in the New World spring what we term "American" International Law — though this expression may be ambiguous and has been employed many times with different meanings, many of them utterly unacceptable.⁹⁹

⁹⁹ One of the acceptations of the term is that of "a collection of concrete cases in international questions which have occurred in America." In this sense the expression has been taken by Pradier-Fodéré: "Traité de Droit International Public Européen et Américain," and Seijas: "El Derecho Internacional Hispano-Americano Publico y Privado" (Caracas, 1884).

In this connection, some publicists of the United States have gathered together and classified methodically the international questions which interest their country and which have been the subject either of conventions, or of diplomatic negotiations, or of decisions by tribunals of justice. These works also have been referred to as American International Law: *e. g.*, Wharton: "A Digest of the International Law of the United States," and Moore: "A Digest of International Law," 8 vols. (Washington, 1906).

Not a few of the difficulties between European and American states have arisen because the fact of the existence of an "American" International Law has never been clearly proved, though it is the most important point untouched in the study of International Law.

III

As a conclusion to the present work, we believe it useful to draw an outline classifying systematically and indicating in a manner distinct from that of the previous section the principal matters included in our subject of "American" International Law.

Another meaning given to that term is in contradistinction to "European" International Law: to indicate that there is an antagonism of interests between the Old and the New Continent. In this sense, the existence of an "American" International Law provokes, and justly, warm protests on the part of the states of both hemispheres, as it is clearly absurd to hunt for and suppose antagonisms where everything should tend toward solidarity. And because of the expression having been taken in this acceptance, some members of the First and Second Pan-American Conferences denied the existence of an "American" International Law. (*See* "Conferencia Internacional Americana," official edition, Washington, 1890, Vol. II, pages 969-970.) Compare "Actas y Documentos de la Segunda Conferencia Pan-Americana," Mexico, 1902, Vol. I, pages 342-343.

A third acceptance of the term indicates by the expression "American Public Law" and even "South American Public Law" (*e. g.*, in the preamble of the treaty of April 20, 1886, between Peru and Bolivia, settlement of boundaries) the solidarity of interests existing between the states of these groups.

A fourth acceptance is in the sense of "the international rules which the states of America expressly recognize in the Pan-American Conferences and to which they give great importance." In this sense, the First Pan-American Conference recognized arbitration, and the Second Conference recognized the principles stated in the three conventions signed at the First Hague Conference as rules of "American International Law."

Finally, a fifth acceptance of the term considers as rules of "American" International Law certain principles "*sui generis*" which it is sought to establish as a privilege for America because of their being of vital interest to that portion of the world and which form an exception to the general precepts of the Law of Nations. A like application is made to the Drago Doctrine by its author himself. (*See*, regarding this acceptance, Drago: "Les Emprunts d'État et leurs Rapports avec la Politique Internationale" in the "Révue Générale de Droit International Public," Vol. XIV (1907), pages 271 in fine and 287. Compare Moulin: "La Doctrine de Drago" in the same *Révue*, Vol. XIV, pages 466 and 468.

PROBLEMS EXISTING IN EUROPE AND WITHOUT APPLICATION ON THE
AMERICAN CONTINENT:

1. *The political "balance of power."*
2. *Principal manifestations of imperialism:*
 - (a) colonial system;
 - (b) zones of influence or *hinterland*.
3. *International condition of certain states or portions of territory:*
 - (a) personal and real union;
 - (b) semi-sovereign states;
 - (c) protected states;
 - (d) free colonies;
 - (e) perpetually neutral states.
4. *International problems relative to population: conditions of emigration.*

PROBLEMS OF SPECIAL INTEREST TO THE AMERICAN CONTINENT:

1. *Problems relative to the international condition of the continent:*
 - (a) virtual occupation and effective occupation of the entire continent; the consequences from the international standpoint;
 - (b) international effect which a movement of independence of the European colonies existing in America would have;
 - (c) transfer of those colonies from one country to another;
 - (d) occupation, especially by title of war, of any portion of American territory by a European country;
 - (e) international situation of the islands and polar regions of antarctic America; to what extent they may be acquired by occupation or be included within the zones of influence of European or American states.
2. *Problems relative to the possible limitation of the sovereignty of the states of America:*
 - (a) limitations which may exist in some of the diplomatic negotiations of the Latin-American republics, especi-

- ally in regard to the submitting of their sovereignty to a European state;
 - (b) voluntary cession or lease of a portion of American territory to a European state;
 - (c) voluntary incorporation of one American state into another;
 - (d) voluntary secession of a state;
 - (e) annexations and concessions of contested territories.
3. *Problems relative to the territorial concessions which a state may make:*
- (a) leases or concessions of portions of territory made to foreign states or syndicates; their results;
 - (b) international condition of those concessions when the conceding state delegates to the concessionary certain attributes of its sovereignty.
4. *Problems relative to the delimitation of boundaries:*
- (a) delimitation of boundaries, principally between more than two countries;
 - (b) value of natural boundaries;
 - (c) *uti possidetis* of 1810; its origin, object, and scope;
 - (d) rights and duties of contesting states, in territory contested, during the contest;
 - (e) value of the concessions made by one contestant state over a zone of contested territory, which, by arbitral award or otherwise, remains in the possession of the other contestant.
5. *Problems relative to the routes of communication:*
- (a) international situation of the routes of communication which may unite and those which actually do unite the two great oceans;
 - (b) the Pan-American Railroad;
 - (c) the international rivers.
6. *Problems relative to the increase of population of the states:*
- (a) conditions of immigration;
 - (b) states, before the public law of each state, of the portions of territory peopled exclusively by colonists of the

same nationality; the influence upon international relations;

(c) likewise when the colonists are of different nationalities.

7. *Problems relative to the responsibility of the states:*

- (a) responsibility which European governments impose on some American states because of injuries occasioned to their citizens as a result of civil wars, strikes, or other internal disorders;
- (b) responsibility of states for the acts of insurgents who have succeeded so far as to constitute a new government but have afterwards been suppressed;
- (c) the abuse of the employment of diplomatic agencies, practiced by some European states in support of their citizens;
- (d) naval demonstrations and other methods of intimidation resorted to by those same nations in support of their diplomatic claims;
- (e) responsibility of the American governments for acts of savage tribes inhabiting territory under the sovereignty of those governments, but not under their effective authority;
- (f) likewise for acts of native tribes under their sovereignty and authority;
- (g) likewise for acts of nomad tribes while crossing the frontiers of their territory;
- (h) likewise for the acts of civilized individuals or native tribes committed in disputed territory.

8. *Problems relative to the attitude which the states of America should observe in case of civil war in another state of the same continent:*

- (a) in case the civil war results in secession;
- (b) to what extent they should observe neutrality in case of civil war, and the best manner of observing it;
- (c) international measures best suited to prevent or suppress civil wars.

PROBLEMS WHICH, BECAUSE OF THE SPECIAL POLITICAL ECONOMIC OR SOCIAL CONDITIONS OF THE STATES OF AMERICA, RECEIVE OR ARE LIKELY TO RECEIVE A SOLUTION DIFFERENT FROM THAT WHICH THEY RECEIVE IN EUROPE:

1. *Federal States.*
2. *Confederations.*
3. *Nationality.*

CONVENTIONAL INTERNATIONAL LAW IN AMERICA:

1. *Basis of the codification of Public and Private International Law.*
2. *Conventions of universal character.*
3. *Conventions of a Pan-American character.*
4. *Conventions of a Latin-American character.*

IV

In spite of the obvious existence of an "American" International Law in the acceptance which we have just indicated, it has not been studied nor even clearly stated by the publicists either of Europe or America. American publicists, in treating any matter whatever of an international character, have simply followed the doctrines and diplomatic precedents of Europe, without inquiring whether or not such doctrines and precedents are in conformity with the fundamental institutions or the peculiar manner of life of the states of the New World.

The only publicist who seems to have grasped the idea of an "American" International Law is Alcorta;¹⁰⁰ but he has not expressly affirmed its existence nor indicated its fundamental characteristics, nor, much less, the matters which constitute it. On the contrary, he follows invariably the doctrines of the other European writers. Moreover, in his "*Curso de Derecho Internacional Privado*" (Buenos Aires, 1887) in the chapter on "Nationality," he does not

¹⁰⁰ Alcorta: "*Cours de Droit International Public*," Vol. I (the only one published), Paris, 1887, Preface, Chap. II, No. II; Chap. IV, Sec. No. VI.

even declare the distinctively American characteristics of that institution and its peculiarities in the countries of this continent.

If we are to arrive at any practical conclusion, it is that the publicists of the New World should occupy themselves particularly with the study of the matters constituting "American" International Law, clearly pointing out its salient features so that the countries of America may be able to follow a uniform policy on those matters.

And this is all the more necessary, because, with the increasing economic development of these countries will come new problems which will necessitate new norms of foreign policy — problems which may become grave dangers if the states involved are not prepared promptly to solve them on the basis of clear and well-defined principles.¹⁰¹

ALEJANDRO ALVAREZ.

¹⁰¹ At the Third Latin-American Scientific Congress, which was held in Rio Janeiro in August, 1905, we, in our capacity of delegates of Chile, presented a motion to have that assembly recognize the existence of an "American" International Law in the sense which we have just indicated, and recommend its study in the universities of the New Continent. We solicited, likewise, that all the questions to be considered in the next Congress, to be held in Santiago in December, 1908, should be exclusively of an American character.

At the first Pan-American Scientific Congress, held at Santiago, Chile, in December, 1908, the following resolution was moved by the writer, and adopted: "The First Pan-American Scientific Congress recognizes that in the New World there exist problems *sui generis* or of a character completely American; and that the states of this hemisphere have regulated by means of more or less general treaties, matters which interest only themselves or which, though of a universal interest, have as yet not been incorporated in a world-wide convention. In this last case there have been incorporated in international law principles of American origin. The sum of these materials constitutes what may be called American problems and situations in international law. The Congress recommends to all states of this continent that in their faculties of jurisprudence and the social sciences special attention shall be given to the study of this subject."

NEUTRALIZATION OF THE PANAMA CANAL

The question whether or not the United States Government should construct fortifications commanding the entrances to the Panama Canal is one that must be determined by law or public policy. The law is set forth in the Hay-Pauncefote Treaty, and while this does not in terms forbid the construction of fortifications, nevertheless, the principle of neutralization which is established by that treaty imposes on us certain obligations, and if those obligations set a bar to their construction we are morally bound to abstain from constructing them. If the treaty imposes no such obligation, then the question should be determined by policy. Which is the better policy, to construct them or not to construct them?

It might be claimed that some regard should be paid to the professions we have made for more than half a century that the construction of the canal was not for our special benefit, but for the common good of the world on equal terms to all, and that to seek special advantages, such as are supposed to accrue from the construction of fortifications, lays us open to the charge of inconsistency, if nothing more. If the conditions under which those professions of philanthropy were made had changed there might be reason for a change in policy, for nations are seldom consistent except when it is to their advantage to be so. But it is evident that the existing conditions tend to strengthen our ability to adhere to our former policy. We are better able to-day to maintain an attitude of benevolence, if it may be so called, than ever before. Is it wise under these circumstances to adopt a new policy?

It is believed that it can be shown that the Hay-Pauncefote Treaty imposes on the United States, inferentially at least, the obligation to abstain from the erection of fortifications; but that whether it does, or does not, the advantages derived from them are so insignificant that it is better policy not to construct them.

Until the last quarter of the 19th century we were unable alone to protect a canal connecting the two oceans at Panama and the

idea of constructing one as a governmental enterprise, had not yet been seriously considered by the American people. Being unable to protect it ourselves without aid, we were anxious that other nations should help us to construct and to maintain its freedom of transit on terms of entire equality. This sentiment is evidenced in documents of the highest official character, which now stand out as silent witnesses to a policy of disinterestedness that we can not consistently abandon without having our motives questioned by all civilized peoples.

The Clayton-Bulwer Treaty, made with Great Britain in 1850, states, that "the contracting parties, likewise agree, that each shall enter into treaty stipulations with such of the Central American states as they deem advisable, for the purpose of carrying out the great design of this convention, namely: that of constructing and maintaining the said canal as a ship communication between the two oceans *for the benefit of mankind, on equal terms to all.*"¹

Henry Clay, speaking for the government of the United States when he was Secretary of State, states that the benefits of the canal "ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon payment of a just compensation or reasonable tolls."

The Senate of the United States in 1835, unanimously passed a resolution requesting the President to consider the expediency of opening negotiations with the governments of other nations, and particularly with the governments of Central America and New Granada, for the purpose of effectually protecting, by suitable treaty stipulations with them, "the free and equal right of navigation of such canal to all nations, on the payment of reasonable tolls as may be established, to compensate the capitalists who may engage in such undertaking and complete the work."

The House of Representatives, four years later, passed a resolution of similar import.

President Polk, in submitting the treaty made with New Granada, to the Senate, said: "In entering into the mutual guarantees proposed by the thirty-fifth article of the Treaty, neither the Govern-

¹ The italics are the author's.

ment of New Granada nor that of the United States has any narrow or exclusive view. The ultimate object as presented by the Senate of the United States in the resolution to which I have already referred, is to secure to all nations the free and equal right of passage over the Isthmus."

In 1856, President Pierce sent two commissioners to New Granada to propose the creation of an independent neutral district on the Isthmus, with a view to the security of the transit route. "It is not designed," said Mr. Marcy, then Secretary of State, "to secure any exclusive advantages to the United States. To remove all objections of this sort an article is proposed securing the common use of the Panama route to all foreign nations."

General Cass in 1857, while Secretary of State, asserted in a communication to the British Government, that "the United States demanded no exclusive privileges in the interoceanic passages of the Isthmus."

Mr. Cleveland, in his first message to Congress, uses the following expression with reference to a canal: "Whatever highway may be constructed across the barrier dividing the two great maritime areas of the world must be for the world's benefit, *a trust for mankind.*"²

In September, 1869, Mr. Hamilton Fish, Secretary of State, in a letter to Mr. Hurlbut, Minister to Colombia, states that President Grant regards the canal as an American enterprise, and he "desires it to be undertaken under American auspices, to the benefit of which the whole commercial world should be fully admitted."

In a letter to the Secretary of State, Mr. Rives, our Minister to France, tells of an interview he had with Lord Palmerston, in which he said to him that, * * * "The United States sought no exclusive privilege or preferential right *of any kind* in regard to the proposed communication, and their sincere wish, if it should be found practicable, was *to see it dedicated to the common use of all nations, on the most liberal terms and a footing of perfect equality for all.* That the United States would not, if they could, *obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind.*"

² The italics are the author's.

The foregoing official utterances and the publications of private citizens, both of which might be multiplied indefinitely, show that the people of the United States, while they felt a great interest in the construction of the canal, advocated it from no selfish motive. We were not only willing but anxious that others should enjoy its benefits in common with us. As the nation grew stronger, a less liberal spirit developed, which culminated in the policy of national ownership, as well as exclusive control and management, to the end of giving to the United States supposed military advantages. In furtherance of this idea, the construction of fortifications commanding the entrance to the canal is now advocated, and it is claimed that such construction will not be in conflict with the obligations of neutrality which we have assumed in the Hay-Pauncefote Treaty.

The disastrous failure of De Lesseps at Panama and the less disastrous, but no less complete, failure of the Maritime Canal Company at Nicaragua, demonstrated the magnitude of the enterprise and produced an impression, not well founded, that success was only to be accomplished by this government itself undertaking the job. As a matter of fact, however, had the United States government held itself aloof and not determined to build a canal, it is quite probable that the Panama Canal would have been built by a private corporation. There was no justification for two canals, and if the United States undertook the construction of one, the other could not be financed.

There was one serious obstacle, however, in the way of the government of the United States building the canal. The Clayton-Bulwer Treaty bound both nations never to obtain or maintain exclusive control over any railway or canal across the Isthmus. Under the obligations of that treaty the construction of the canal by the United States Government was impracticable, and there seemed to be no honorable way out of the difficulty except by a supplemental treaty.

The much maligned Clayton-Bulwer Treaty was practically an alliance between Great Britain and the United States, made for the purpose of protecting and maintaining the freedom of transit across the Isthmus. Notwithstanding all the maledictions heaped on it by the American people, it was not such a bad treaty for the United

States after all. At the time it was made, Great Britain occupied a part of Central America and claimed ownership of the country at the mouth of the San Juan River, the Atlantic terminus of the proposed Nicaragua canal. It is doubtful whether or not this claim could have been successfully contested, and if it could not, it would have given Great Britain absolute control of that route, then regarded as the best, and would have placed the United States in a position of great disadvantage.

With a view, however, to giving the United States the right to build and own a canal to connect the two oceans, Great Britain, in a commendable spirit of fairness, consented to a supplemental treaty. This is known as the first Hay-Pauncefote Convention. It was approved by President McKinley and submitted to the Senate of the United States for ratification. After considerable debate, several amendments were adopted, and in its amended form it was ratified by the Senate.

The essential parts of the treaty as amended are as follows:

Article I.

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Convention, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

Article II.

The High Contracting Parties, desiring to preserve and maintain the "general principle" of neutralization established in Article VIII of the Clayton-Bulwer Convention, *which convention is hereby superseded*,³ adopt, as the basis of such neutralization, the following rules, substantially as embodied in the convention between Great Britain and certain other Powers, signed at Constantinople, October 29, 1888, for the Free Navigation of the Suez Maritime Canal,³ that is to say:

1. The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and war of all nations, on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise.

³ See Supplement, p. 123.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war or warlike materials in the canal except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this Article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

It is agreed, however, that none of the immediately foregoing conditions and stipulations in sections numbered one, two, three, four, and five of this article shall apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order.⁴

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance and operation of the canal shall be deemed to be part thereof, for the purpose of this Convention, and in time of war as in time of peace shall enjoy complete immunity from attack or injury by belligerents and from acts calculated to impair their usefulness as part of the canal.

7. No fortifications shall be erected commanding the canal or the waters adjacent. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

Article III.⁵

The High Contracting Parties will, immediately upon the exchange of the ratifications of this Convention, bring it to the notice of the other Powers and invite them to adhere to it.

The amendments made by the Senate were not satisfactory to Great Britain and she rejected it. The treaty thus failed. It

⁴ Inserted by Senate.

⁵ Stricken out by the Senate.

was claimed by Great Britain that one clause in Article II prohibiting fortifications, and another authorizing the United States to take such measures as it might "find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order" were not in harmony and might give rise to grave misunderstanding. It was, moreover, claimed that the amendment striking out the clause inviting other powers to become parties to the contract, would place Great Britain at great disadvantage with respect to other powers, inasmuch as she would be bound to respect the neutrality of the canal, whereas they could disregard it.

It became necessary to try again and see if the differences could be reconciled. A new treaty was accordingly negotiated by the same plenipotentiaries. This new treaty was submitted to the Senate and after some discussion was ratified without amendment and promulgated by President Roosevelt, February 22, 1902.⁶

Subsequent to the ratification of the Hay-Pauncefote Treaty, another was made between the United States and Panama, which state had seceded from the United States of Colombia. This is known as the Hay-Bunau-Varilla Treaty.⁷ By means of these two treaties the United States came into possession of all the rights necessary to enable it to construct, own, manage and protect a canal connecting the two oceans, and since then its construction has been undertaken and is in progress.

The Treaty as at first approved by the Senate of the United States but rejected by Great Britain, as well as the subsequent one, which was ratified by both governments, contain some prominent features of similarity, which are of interest in the following discussion. Both treaties provided for the construction of the canal as a national enterprise, should the United States decide to construct it that way. Both provided for neutralization. In the first, the two nations jointly guarantee the neutrality of the canal, and in the second, that burden is assumed by the United States alone. It is to be noted, however, that while the Senate did not object to the dual guarantee of neutrality, it did object to inviting other nations to join in it.

⁶ See Supplement, p. 127.

⁷ See Supplement, p. 130.

Both treaties provided that the principle of neutralization established by Article VIII of the Clayton-Bulwer Treaty was not to be impaired. The first provided that no fortifications should be constructed commanding the canal, but the second omits this prohibitive clause. In the ratified treaty an entirely new article was added, providing that any change in territorial sovereign over the region traversed by the canal, was not to affect the general principle of neutralization nor the obligations of the High Contracting Parties.

The great principle of neutralization stands out prominently in both treaties and is provided for in almost identical language, except that in the first draft, both contracting parties adopt it, and in the second, the United States adopts it.

The word "neutralization" occurs in the treaty three times, showing that the negotiators did not use it without due consideration. It seems clear that whatever may have been the meaning of the word in the minds of the plenipotentiaries and of the two governments, there can be no doubt but that it was intended that "neutralization" whatever it meant was to be established so far as it could be done by treaty between the two nations concerned. Whether or not it would have been better to have done it by a convention of the maritime nations of the world is not material. The question is, does the treaty as ratified, establish neutralization, and if so, do our obligations under it permit us to construct fortifications to command it?

The word "neutralization" is of modern origin. In ancient times he who was not a friend was an enemy. In later days, nations declined to take part in a war between others and these were called neutral nations. They were foes to neither side and sometimes friends to both. This is the oldest form of neutrality, and the status of the neutral nation was proclaimed generally by the sovereign and became binding on the inhabitants thereof.

Still later a new practice grew up. Territory was neutralized by agreement or convention, the parties interested agreeing that certain territory should be exempt from war. This had its origin in Europe, the nations taking part in such agreements being generally those whose location gave them an immediate interest. Distant na-

tions seldom took part in these conventions. The nation whose territory was neutralized was a party to the agreement, and received in consideration of the relinquishment of its rights of war some other privileges or advantages. The neutralization of Switzerland, Belgium and Luxemburg in the early part of the last century are examples of this kind of neutralization. The parties to these agreements covenant to refrain from sending armed forces into the region neutralized.

Still later another kind of neutralization came into use, namely, that of nurses and doctors in attendance on the sick and wounded in war, even when in the service of belligerents. The hospitals and ambulances of combatants were neutralized in a similar way. This was done by the Geneva Convention, which was signed by representatives of nearly every civilized nation on the globe. Still more recently the Hague Convention neutralized hospital ships in certain cases, giving them a status of exemption from capture which they did not before possess.

Another kind of neutralization is that of waterways, either natural or artificial. There are several cases of the neutralization of the former, but up to the time of the Hay-Pauncefote Treaty, only one of the latter, namely, that of the Suez Canal.⁸ The peculiar interests of all maritime nations in these waterways have given rise to special rights of navigation which can not be ignored, even by the sovereign power in which the waterway may be located. In the neutralization of territory, belligerents are especially excluded from trespass; in the neutralization of waterways, freedom of passage is the essential characteristic.

John Bassett Moore, Professor of International Law and Diplomacy, Columbia University, says:

The term neutrality in its ordinary sense, refers to a state of hostilities, and denotes the attitude and the duty of a noncombatant or neutral power toward the parties to the conflict. It signifies not only impartiality, so far at least as conduct is concerned, but also abstention from acts which may aid either belligerent in its conflict with the other. Such is the subjective use of the word. When used objectively with reference to an interoceanic canal, it embraces belligerent as well as neutral powers.

⁸ See Supplement, p. 123.

and while positively referring to the former, defines the attitude and duty of both. It signifies that the thing is "neutralized," that is, it is to be treated as neutral, and, therefore, it is not to be made the subject of attack, nor distinctively employed as a means of hostilities.

Latané says:

Neutralization implies: (1) A formal act or agreement. It is a matter of convention constituting an obligation, not a mere declaration revokable at will. (2) It implies a sufficiently large number of parties to the act to make the guarantee effective. (3) It implies the absence of fortifications. The mere existence of fortifications would impeach the good faith of the parties of the agreement. (4) It implies certain limitations of sovereignty over the territory or *thing* neutralized. (5) It implies a more or less permanent condition. It differs from ordinary treaty stipulations terminated by war between the contracting parties. A treaty establishing neutralization is brought into full operation by war.

When we come to extend the same principle to waterways, however, we find the conditions to be altogether different. The first and most fundamental difference is that states have acquired by international usage and prescription rights and interests in the territorial waters of other states, which they have no claim to exercise in respect to land. Secondly, armies and implements of war are absolutely excluded from the territory of neutralized states, *while neutralized waterways are by design open to the innocent passage of warships, not only in time of peace but also in time of war.*

Wheaton says:

Neutralization is the assignment to a particular territory or territorial water of such a quality of permanent neutrality in respect to all future wars, as will protect it from belligerent disturbance. This quality could only be impressed by the action of the great powers by whom civilized wars are waged and by whose joint action such wars may be averted.

Henderson, in *American Diplomacy*, says, in reference to an Isthmian Canal, that

Neutralization means an exemption from all warlike operations, and this condition can only be effected by an agreement of all parties to abstain from such warlike operations.

It will be noticed that one central idea pervades all, viz: that neutralization means immunity from war and warlike operations. In the case of neutralized territory it is immunity from war and exclusion of combatants, in the case of neutralized waterways, it is immunity from war and freedom of passage.

That immunity from war can only be secured by a convention of the nations that make war is only partially true. A state of preparedness for war, or a nation's ability to make trouble for a prospective adversary will often secure immunity. No nation will make war on another unless there is some strong reason for it, and an equally strong belief that the result will justify the undertaking. It is not improbable that the United States alone may be able to prevent war on the Isthmus. It is certain that the United States and Great Britain together can.

There are several precedents of the neutralization of natural waterways by powers less able to maintain it than the United States. The Straits of Magellan⁹ are neutralized by Argentina and Chile, yet nearly every maritime nation in the world is interested in the navigation of the straits and all have thus far respected that status.

The Panama Isthmus was neutralized by the United States alone in its treaty with New Granada in 1846.¹⁰

The Suez Canal was at first neutralized by a decree of the Khedive of Egypt, confirmed by a firman of the Sultan of Turkey. It is notorious that these two powers could not have maintained its neutrality in the face of strong opposition; nevertheless, the neutrality, inadequate as it was, was respected, as the following incident will show. During the war between France and Germany in 1870, eighteen years before the Convention of Constantinople had gone into effect, a corvette belonging to Germany met a similar French vessel in Lake Tismah. It was the anniversary of the birth of the Emperor of France. The two vessels anchored near each other, an Egyptian vessel being there also. In honor of the Emperor, the Frenchman dressed ship and fired a salute. The German did the same. Yet if these two vessels had met in the open sea, a combat would have resulted.

To claim, however, as has been done, that the Panama Canal is not neutralized because only two nations, viz: Great Britain and the United States, have acceded to it is to deny that the United States can maintain it. Neither law nor usage prescribes the particular

⁹ See Supplement, p. 121.

¹⁰ See Supplement, p. 108.

number of powers necessary to make neutralization effective. One nation as a guarantor of neutrality may be worth a dozen.

Oppenheim, in his work on International Law, says:

The Panama Canal, which is being built by the United States of America, is *permanently neutralized*, through Article III of the Hay-Pauncefote Treaty of November 18, 1901. But this treaty is not a general treaty of the Powers either, being concluded by the United States and Great Britain only.

He further states that

The four neutralized states, namely, Switzerland,¹¹ Belgium,¹² Luxemburg,¹³ and the Congo State,¹⁴ are a product of the 19th century only, and it remains to be seen whether neutralization can stand the test of history.

In the neutralization of the Suez Canal, the central idea was freedom of passage and immunity from war. The nine nations which neutralized it are all located in close proximity thereto. The case is different with reference to the Panama Canal. All maritime nations except the United States are located far from it. The Suez Canal is owned and operated by a stock company. It is chartered by the sovereign power of the country in which it is built. The stock is largely held by individuals residing in various parts of the world. A large part is owned by the British Government, but she holds it just as the individual stockholder does. It gives her a potent voice in the management, but nothing more.

The Panama Canal is the exclusive property of the United States Government, but it is located in a foreign country, the site of which has been conveyed to us *in trust* for the benefit of the world's commerce. It was not conveyed with the idea of increasing the naval or military strength of the United States.

The preamble to the Hay-Pauncefote Treaty recites that

The United States and Great Britain being desirous to facilitate the construction of a canal to connect the Atlantic and Pacific Oceans and to

¹¹ See Supplement, p. 106.

¹² See Supplement, p. 108.

¹³ See Supplement, p. 118.

¹⁴ See Supplement (January, 1909), p. 26.

remove any objection that may rise out of the Clayton-Bulwer Treaty to its construction by the United States *without impairing the general principle of neutralization established by Article VIII of said Treaty*, have for that purpose appointed as their plenipotentiaries, etc.

It is evident that the treaty recognizes, first, that a general principle of "neutralization" had been established by Article VIII of the Clayton-Bulwer Treaty, and second, that the principle so established is not to be impaired by anything in the new one.

Article VIII of the Clayton-Bulwer Treaty reads as follows:

The Governments of the United States and Great Britain having not only desired, in entering into this Convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection by treaty stipulations, to any other practicable communication, whether by canal or railway, across the Isthmus which connects North and South America, and especially to the interoceanic communication, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

At the time the Clayton-Bulwer Treaty was made the Nicaragua route was regarded as the best and was the one under immediate consideration. The other articles of that treaty relate chiefly to that projected canal.

Article VIII extends the principle of neutralization to any other route or system of communication across the Isthmus. Four years after the treaty went into effect the Panama Railway was built. It would be interesting to know just what action the United States would have taken in maintaining the principle of neutralization established by the Clayton-Bulwer Treaty, had there been no treaty between New Granada and the United States. Every instance of intervention by the United States to maintain the freedom of

transit over the Panama Railroad, was under the provisions of the treaty with New Granada.

Now what was the "general principle of neutralization" established by Article VIII of the Clayton-Bulwer Treaty? Evidently it was protection, protection for the purpose of maintaining the canal or railway open at all times. A canal or railway across the isthmus would necessarily be constructed in the wilderness of a nation utterly incapable, unaided, of keeping it open, even if at war with a comparatively weak naval power. Moreover; revolutions were of frequent occurrence there, and these would tend to create conditions inimicable to freedom of transit. Whatever means of transit might be constructed, it was recognized that protection by some other power or powers was necessary to insure uninterrupted transit.

But protection was not all that was contemplated by the treaty. The true significance of Article VIII is only to be had by reading the other articles in connection with it. Both nations were to abstain from acts that would give either an advantage over the other. Neither was to obtain or maintain exclusive control. Neither was *ever* to erect fortifications commanding the canal or the approaches thereto. The possibility of war between the contracting parties was not overlooked, and it was provided in such case that the vessels of each nation in traversing the canal were not to be subject to blockade, detention or capture by the other. The two governments were to "guarantee the neutrality thereof, so that the canal may forever be free and open, and the capital invested therein secure." It will thus be seen that the "general principle of neutralization" established by Article VIII of the Clayton-Bulwer Treaty, which principle must not be impaired, was a broad one and included something more than mere protection.

The Clayton-Bulwer Treaty looked to the construction of a means of transit by a private company; the Hay-Pauncefote Treaty deals with the matter from a different standpoint. The older treaty is superseded, not abrogated. Those provisions that conflict cease to have any binding effect, but where no conflict exists, the spirit of the older treaty would still live. The old treaty forbade fortifications,

the new one is silent on the subject, but this silence is not to be construed as authorization.

The words "being open to the citizens and subjects of the United States and Great Britain on equal terms," which are used in Article VIII, indicate that the vessels of both nations were to be allowed to pass through the canal whenever they demanded passage. No discriminating tolls were to be exacted. No vexatious delays to be incurred by one that would not be incurred by the other. All vessels were to be freely admitted and passed through without hindrance or detention. All of this is part and parcel of the general principle of neutralization established. Is a canal guarded by fortifications, manned by military forces of the United States, "open to the citizens and subjects of the United States and Great Britain on equal terms?" A hospital or hospital ship, which is neutralized, is not provided with guns for protection; it depends on the Red Cross flag which it flies, and this emblem of neutrality is respected by all civilized nations.

John Bassett Moore, Professor of International Law and Diplomacy, says: "The idea of neutrality or of neutralization has usually been deemed incompatible even with the mere maintenance of armed forces and fortifications."

The Treaty of Vienna, which provides for neutralizing the free town of Cracow, stipulates that no armed forces should be introduced there on any pretense whatever.

The Treaty of Paris, which neutralizes the Black Sea, forbids the maintenance of armaments upon it.

In the neutralization of Luxemburg, it was stipulated that the city of Luxemburg should no longer be treated as a federal fortress.

In the neutralization of the Ionian Islands,¹⁵ it was stipulated that "The fortifications constructed in the Island of Corfu and its dependencies having no longer any object, shall be demolished."

The treaties which effected the neutralization of the lower Danube¹⁶ and the works constructed in aid of its navigation, provided that all the fortresses and fortifications existing on the course

¹⁵ See Supplement, p. 116.

¹⁶ See Supplement, p. 114.

of the river from the Iron Gates to its mouth should be razed and no new ones erected.

In the treaty between Chile and the Argentine Republic, the Straits of Magellan were neutralized forever, and their free navigation is guaranteed to the flags of all nations. To insure this neutrality and freedom it was agreed that, "no fortifications or military defense *which might interfere therewith shall be erected.*"

After the separation of Belgium and Holland in 1830, the Powers agreed that as the neutrality of Belgium had been guaranteed, it was regarded as necessary that the Belgium fortresses of Nimi, Ath and others should be demolished.

The Treaty of Constantinople that neutralizes the Suez Canal, expressly forbids the erection of fortifications to command it or its approaches.

Professor Moore says further: "The idea of erecting fortifications even if no offensive or hostile use of them be intended for the purpose of preserving neutrality is novel in public law."

Article II, of the Hay-Pauncefote Treaty, provides that the United States Government, "should have and enjoy all the rights incident to such construction, as well as the exclusive right of regulation and management of the canal." Protection of a thing constructed may be fairly considered as "an incident to construction." The construction of the canal would never have been undertaken, if after it was built, it could not be protected. But fortifications are not necessarily required for protection. The construction of fortifications to command the canal was specifically forbidden in the Clayton-Bulwer Treaty, though the treaty provided for protection. They were also forbidden in the first draft of the Hay-Pauncefote Treaty, though that treaty was amended by the Senate in other respects. When, therefore, protection is claimed as an incident to construction, it can not be assumed that the protection is necessarily to be by means of fortifications. Protection is provided for the Suez Canal, in the Treaty of Constantinople, but fortifications are forbidden.

Again, Article II, of the Hay-Pauncefote Treaty reads, that the United States is to "enjoy all the rights incident to construction,

as well as the exclusive right of regulation and management, *subject to the provisions of the treaty.*" The rights of regulation and management, as well as those incident to construction are, therefore, limited. What are the provisions of the treaty that limit the rights incident to construction, and to regulation and management? One is, that the canal is to be free and open to vessels of *commerce and war* of all nations on terms of entire equality. Another is, that there is to be no discrimination in respect to conditions and charges of traffic or *otherwise*. It may be assumed that there will be no discrimination in respect to charges of traffic, that the tolls levied will be equitable and just, but the word *otherwise* has some special significance, and would seem to be intended to cover every other contingency that might arise in respect to the passage of vessels through the canal. In other words, that under all circumstances, at all times, and under all conditions, passage was to be granted, provided the rules regulating the same were complied with. If that be the case, the canal would be on the same footing as the Suez Canal, open in time of war as in time of peace to all that comply with the rules, and fortifications can not be claimed to be needed to enforce compliance with the rules.

Could a nation at war with the United States fairly comply with the rules and send its fleet through the canal? The answer is an emphatic "no." No nation would send its ships through the canal in time of war with the United States without first taking measures that would render their passage safe beyond all chance. It would be necessary to remove all *possible* enemies including the lock tenders, and this would be an act of hostility in violation of the rules. The peaceful passage through the canal in time of war of an enemy's fleet is, therefore, out of consideration.

The first sentence of Article III of the Hay-Pauncefote Treaty states, that the "United States adopts as a basis of neutralization of such ship canal the following rules substantially as embodied in the Treaty of Constantinople signed the 29th of October, 1888, for the free navigation of the Suez Canal." Then follow six rules taken almost verbatim from the latter treaty. These rules form the ground work of the Hay-Pauncefote Treaty. They are not for

time of peace alone, but for time of war as well. Indeed, Article III, contains stipulations that can only become operative in time of war.

It has been claimed that the treaty will be annulled by war between the signatory powers. But will it? That treaties are generally annulled by war is true, but not such treaties as the Hay-Pauncefote Treaty. If its provisions are not binding in war, what are they for? Why stipulate that the canal shall never be blockaded if on the breaking out of war the stipulation does not hold? Great Britain could not blockade the canal in time of peace. Why stipulate that no right of war nor any act of hostility shall be committed within it? An act of hostility would not be committed in time of peace. The treaty was made to meet war conditions, and must be binding on the parties to it. That the United States or Great Britain might give no heed to it when war breaks out, is true, but it would be a breach of faith, and it would receive, as it would merit, the just condemnation of all civilized powers.

Mr. Justice Washington, in handing down a decision of the Supreme Court said:

We are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between two governments. Treaties stipulating for permanent rights and general arrangements and professing to aim at perpetuity, and to deal with a case of war as of peace, *do not cease on the occurrence of war*.

The United States declined to accept the doctrine of the annulment of treaties by war, in 1898, when war existed between the United States and Spain. The United States on that occasion claimed that Article XIII of the Treaty of 1795, being expressly applicable to war between the contracting parties, was not abrogated thereby.

Oppenheim says:

The doctrine was formerly held, and a few writers maintain it now, that the outbreak of war, *ipso facto*, cancels all treaties previously concluded between the belligerents, such treaties only excepted as have been concluded especially for the case of war. The vast majority of modern writers on international law have abandoned this standpoint and the opinion is pretty general that war by no means annuls every treaty.

But unanimity in regard to such treaties as are and such as are not cancelled by war, does not exist * * * It is obvious that *such treaties are not annulled as have especially been concluded* for the case of war, as treaties in regard to the neutralization of certain parts of territories of belligerents for example.

The first sentence of the Hay-Pauncefote Treaty recognizes the fact that the Suez Canal is a neutralized waterway. It is also clear that the neutralization of the Suez Canal means its freedom of navigation and immunity from war. Can there be any doubt that the neutralization of the Panama Canal means the same? The Hay-Pauncefote Treaty goes even farther than the Constantinople Convention, in its recognition of the neutralization of the Suez Canal, for the word neutralization is not mentioned in the Constantinople Convention. It was purposely excluded from the latter to prevent any misunderstanding of the status of the canal. That status was not to be made dependent on the meaning of a word, about which, at the time, there was some dispute. As a matter of fact, it was the British Government which objected to the word "neutralization" in the Treaty of Constantinople, and that government was represented in the negotiation of the Hay-Pauncefote Treaty by the same Lord Pauncefote, who represented it in the negotiation of the Constantinople Treaty. He did not object to the use of the word in the Hay-Pauncefote Treaty, he may even have advocated it. It is probable that the word was agreed to by both negotiators, because it fitted the case in hand better than any other.

The United States has for more than fifty years been the sole guarantor of the neutrality of the Panama Railroad, and its sufficiency has never been questioned. When the freedom of transit has been threatened, as it has been on numerous occasions, the forces of the government have intervened to maintain the neutrality of the Isthmus, and it has always accomplished the task without friction with any nation whose commerce was passing over the railway.

It may be claimed that a nation can not neutralize its territory or other possessions merely by a treaty with another power. This is true with respect to its ordinary possessions, but the Panama Canal is not an ordinary piece of property. The ownership of the

land on which the canal is being built was conveyed to the United States for a special purpose, and is held *in trust* to secure the execution of that purpose. The entire world is interested in its accomplishment and perpetuation. It stands thus on a different footing from other possessions. After the canal is opened to navigation and the trade of nations flows through it, as it will, those nations will have acquired rights in respect to its use, which could never be claimed with respect to other property of the United States. The words "neutralize" and "neutralization" have of late years acquired a meaning when applied to waterways that is novel. The neutralization of the Suez Canal has brought these words into familiar use, and given to them a broader significance than they formerly had. It is only a short time since it was claimed that the Suez Canal was not a neutralized canal, because belligerent ships were allowed to pass through it in time of war. To-day that is the main feature of its neutrality.

The words, "The United States adopts as a basis of neutralization," show that whether the word was used strictly in its legitimate sense or not, it had a meaning, understood by the negotiators and by the two governments; that it meant freedom of transit and immunity from war, and if this is a broader meaning than would have been given to the word a few years ago, it is because there was no other more suitable one in the English language to describe the conditions sought to be established. Except that of the Suez Canal, there had never been in the history of the world a case of neutralization of an artificial waterway.

The absence of the words "in time of war as in time of peace" from clause 1, Article III, of the Hay-Pauncefote Treaty, has given rise to the belief in some quarters that they were omitted at the instance of the United States for the purpose of giving the United States the power of closing the canal to the vessels of an enemy in time of war. Be this as it may, the vessels of a nation at war with the United States will not seek passage through the canal — those of commerce are not likely to reach it if our navy performs its duty on the open sea, and those of war will not place themselves so completely at the mercy of their enemy. The neutral area extends

out only three miles from shore. The omission, therefore, of the words, "in time of war as in time of peace" from clause 1, Article III, is not important.

The Treaty of Constantinople reads: "The Suez Maritime Canal shall always be free and open in time of war as in time of peace, to every vessel of war or commerce, without distinction of flag." The Hay-Pauncefote Treaty reads: "The canal shall be free and open to vessels of commerce and war of all nations observing these Rules on terms of entire equality." It can not be said that these provisions are identical in meaning, but neither are the conditions in the two cases. Both cover the same ground, but in different ways. Both aim at the same target; viz: immunity from war and freedom of passage.

The Treaty of Constantinople was made by nine different nations speaking different languages. It was important that ambiguity should not arise from translation. The Hay-Pauncefote Treaty is a treaty made by two nations, speaking a common language. There is no danger of misunderstanding from translation, whatever there may be from other causes.

Clause 2 of Article III of the Hay-Pauncefote Treaty, as finally ratified, provides that, "The United States, however, shall be at liberty to maintain such military police along the line of the canal as may be necessary to protect it against lawlessness and disorder." The army is an organization provided for by law, officered and equipped for regular military service and used for attack or defense. It may perform the duties of a military police and often does, but its chief function is fighting the organized forces of an enemy. The military police referred to in the treaty, on the other hand, is designated to suppress "lawlessness and disorder," both of which may result from the presence of turbulent and unruly characters on the isthmus rather than from the armed forces of an enemy. It would seem, therefore, that a special organization was referred to, because of the absence of fortifications. Had fortifications been contemplated, there would always be present an organized military force, and this force would always be available to suppress lawlessness and disorder. The first draft of the treaty as amended by the

United States Senate contained, a provision prohibiting the erection of fortifications and authorizing the maintenance of a military police to suppress "lawlessness and disorder." The authorization of a military police seems to follow as a corollary to the prohibition of fortifications. The second treaty which was ratified by both governments contained the same authorization of a military police, but the specific prohibition of fortifications was omitted. The inference seems clear, that the authorization of the military police in the second treaty was inserted, because, inferentially, though not in specific terms, fortifications were prohibited.

The same clause, Article II, states that "no right of war shall be exercised nor any act of hostility committed within it" [the canal]. The erection of permanent fortifications by the United States in time of peace may not be the exercise of a right of war, but it is a preliminary step in that direction. Their erection is an admission that they are intended to be used. If they be used, a right of war will be exercised. The prohibition, therefore, of their erection would seem to be superfluous. The canal must, of course, be protected, but it need not be by fortifications.

The Senate Committee on Foreign Relations, when it made its report on the first Hay-Panuefote Treaty, said: "Whatever canal is built in the Isthmus of Darien, will be *ultimately made subject to the same laws of freedom and neutrality as governs the Suez Canal, as a part of the laws of nations.*"

The treaty with the Republic of Panama provides, that the cities and harbors of Colon and Panama, though both are in the Canal Zone, are not transferred to the jurisdiction of the United States, but that those cities and harbors remain within the jurisdiction of the Republic of Panama. The construction of fortifications will, therefore, practically make both Colon and Panama fortified towns. Panama may be said to be so already, because there exists to-day a fort erected many years ago to resist the incursions of pirates. Colon, however, is a more modern town, having been built since the completion of the railroad and has no defenses. Some of the guns needed to defend the Colon entrance to the canal would be located in the town itself. But are we not morally bound to abstain from

putting the little republic in the unenviable position of being ground between the upper and nether millstone? Ought we to render those towns by fortifying them liable to bombardment in time of war? The practice of bombarding unfortified towns has been condemned as illegitimate warfare, but fortified towns can not claim immunity.

Article XVIII of the Treaty with Panama reads: — "The Canal when constructed, and the entrances thereto shall be *neutral in perpetuity*." * * *

Article XV reads: — "For the better performance of the engagements of this Convention and to the end of the efficient protection of the canal and the *preservation of its neutrality*, the Government of the Republic of Panama will sell, etc."

There can be no doubt as to the meaning of these two sentences. It is not necessary to go back to the circumstances leading up to the conclusion of the treaty to determine what is meant by "*neutral in perpetuity*" and "*the preservation of its neutrality*." Those circumstances throw no light on the meaning of the words. Their true meaning is to be found in the general understanding of English speaking people, and not on circumstances leading up to the making of the Treaty.

Article XXIII of the treaty with Panama reads: — "If at any time it should become necessary to employ armed forces for the safety or the protection of the canal * * * the United States shall have the right * * * to establish fortifications." This is clearly the grant of a right to construct fortifications after the necessity has arisen. Surely, we can not claim the right to construct them in time of peace on this grant of authority.

It has been thought by some that inasmuch as a clause was incorporated in the first treaty forbidding fortifications, which clause was omitted in the second, the omission was for the purpose of giving us the right to construct them. This is not a fair conclusion. It might with equal justice be claimed, that the omission of the clause giving the United States the right to take such measures as it might find necessary for the security by its own forces the defense of the United States and the maintenance of public order, which was inserted by the Senate in the first, but omitted in the second, deprived

the United States of this right. Both were in the first treaty as amended and ratified by the Senate only, and both were omitted in the second which was ratified by both governments. As a matter of fact, they were both omitted at the suggestion of the British Government, because they were not believed to be in harmony and were likely to cause misunderstanding. The treaty was a compromise of conflicting views of the Senate of the United States and the British Government. Each side yielded points to the other for the purpose of reaching agreement, but the general theory on which the first treaty was based, was adhered to as closely as could be done under the circumstances.

We are told by the advocates of fortifications that the Hay-Pauncefote Treaty does not establish neutralization, that the language is ambiguous and that the treaty should have been concurred in by a large number of powers to render the guarantee of neutrality effective. This claim practically admits that neutralization and fortification are incompatible. But can we claim that we have acquired the right to construct the canal as a governmental enterprise, which we could not do while the Clayton-Bulwer Treaty stood in the way, and yet have incurred no obligation to neutralize it after construction? It can scarcely be maintained that all the treaty is ambiguous. The words, "the United States adopts as the basis of the neutralization of such ship canal the following Rules," etc., seems clear enough. They show that it was the intentions of the United States to neutralize the canal and the foundation on which such neutralization was to rest, were certain rules taken almost verbatim from the Treaty of Constantinople which neutralized the Suez Canal. There is no doubt that the British Government as well as our own, understood, at the time the treaty was made, that it neutralized the canal and that is unquestionably the understanding of the British Government to-day. That other nations were not invited to accede to its terms is our own fault, if there be a fault. They would gladly have done so, but we did not want them to become parties to a treaty that might be construed as giving them a right to meddle in Isthmian affairs.

It is incredible that two such men as John Hay, late Secretary

of State, and Lord Pauncefote, the British Ambassador, who negotiated the treaty, could have been ignorant of the meaning of the word "neutralization", which is used repeatedly in the treaty. It is equally incredible that they should have known its meaning and yet have used it in an improper sense. Moreover, the Senate of the United States must take its share of the blame, for it allowed the word to remain in it. The treaty was not negotiated in a day, several years were spent in its discussion. There can be no doubt that a clear understanding of the word was had, and that its meaning as used in the treaty, was in accord with the popular one at the time existing in this country and in Europe.

The following is taken from the report of the Committee on Foreign Relations of the Senate that had charge of the Hay-Pauncefote Treaty:

No American statesman, speaking with official authority or responsibility, has ever intimated that the United States would attempt to control this canal, for the exclusive benefit of our Government or people. They have all, with one accord, declared that the canal was to be neutral ground in time of war, and always open, on terms of impartial equity, to the ships and commerce of the world.

The same Committee states that:

the United States can not take an attitude of opposition to the principles of the great Act of October 22 (29), 1888, without discrediting the official declarations of our Government for fifty years on the *neutrality* of an Isthmian Canal and its equal use by all nations, without discrimination.

The following extract from a letter of Lord Landsdowne to Mr. Hay, Secretary of State, has been quoted as proof that Great Britain conceded the right to construct fortifications at the request of the United States:

I understand that by omission of all reference to the matter of defense, the United States Government desires to reserve the power of taking measures to protect the canal, at any rate, when the United States may be at war, from destruction or damage at the hands of enemies * * *. I am not prepared to deny that contingencies may arise when not only from a national point of view, but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures of the defense of the canal at a moment when they were themselves engaged in hostilities.

At first sight, this letter might seem to concede to us the right to fortify the entrances to the canal in time of peace, but a little consideration will show that it makes no concession of anything. This is a letter from a skilled diplomat. He understands that, "the United States Government desires to reserve the power of taking measures to protect the canal, *at any rate*, when the United States may be at war." It is difficult to say what Lord Landsdowne had in mind when he penned those lines, but it is not difficult to see that he was not conceding to the United States a right to erect fortifications in time of peace.

Article IV of the Hay-Pauncefote Treaty, provides that the "general principle of neutralization and the obligation of the High Contracting Parties under the present Treaty, are not to be affected by any changes in territorial sovereignty or the international relations of the country traversed by the Canal." This is another evidence that the canal is neutralized by the Hay-Pauncefote Treaty, and that it was intended that it should remain so forever, even though Panama should in the future become a part of the United States, the possibility of which is not difficult to imagine.

In framing the Hay-Pauncefote Treaty, there was one evident intention on the part of the negotiators as well as of the two governments concerned; namely, to model the treaty as nearly on the lines of the Treaty of Constantinople, as the difference in conditions would permit, and it is far from clear how the difference in conditions affects the question of fortifications.

Article V of the Clayton-Bulwer Treaty states that the contracting parties (Great Britain and the United States) "further engage that when the canal shall have been completed, they will protect it from interruption, seizure or unjust confiscation, and that they will *guarantee the neutrality thereof, so that the said canal may be open and free*, and the capital invested therein secure." This is a case of only two powers guaranteeing the neutrality of the proposed Nicaragua Canal. It was not built, it is true, but the treaty was made and its stipulations were binding. If Great Britain and the United States could neutralize the Nicaragua Canal, the same powers can neutralize the Panama Canal.

It is believed that the following conclusions may be safely drawn from the foregoing discussion:

First, that the Hay-Pauncefote Treaty is intended to neutralize and does neutralize the Panama Canal.

Second, that neutralization of the canal means immunity from war and freedom of transit; that this freedom of transit extends to all vessels of every nationality without distinction of flag, at all times, in war as in peace, *provided they comply with the rules established by Article III of that Treaty.*

Third, that the sufficiency of the guarantee is not dependent on the number of powers consenting to it, but on the ability of the guarantors to make it good.

Fourth, that the construction of permanent fortifications in time of peace is repugnant to the idea of neutralization and we are, therefore, legally as well as morally, bound to abstain from their construction.

Setting aside, however, all considerations of technical or moral responsibility, and viewing the matter from the standpoint of expediency alone, it is still claimed that fortifications commanding the entrances to the canal are not demanded for defense, and that under the conditions that exist or are likely to exist, their disadvantages more than offset any supposed advantages.

The first question that occurs to the average inquirer is, "what is the object of fortifications and will they after construction accomplish the object sought?" A full discussion of this general question opens up a field too broad for consideration here. It will suffice to state, that the object of fortifications at the entrances of the Panama Canal is to protect it and aid in keeping it open to the passage of vessels, at least our own, at all times and under all circumstances. If fortifications would accomplish these objects or materially aid in their accomplishment, the question of their construction might be an open one. But if they will not protect the canal against the *most probable dangers* to which it is exposed, nor materially aid in so doing, then their construction should not be undertaken.

It may perhaps be claimed that a few twelve-inch guns and mortars together with some torpedoes could prevent a hostile fleet from enter-

ing the canal and from bombarding it from outside. Admitting this, it may be said in reply, that no commander of a hostile fleet would think of entering or passing through the canal without first getting complete possession, and that there is far more danger of bombardment of a fortified canal than there is of an unfortified one. Moreover, there are other ways of meeting both contingencies. The plans of the canal do not expose the locks, dams or regulating works to distant bombardment, and the Hague Convention, which was adopted by all maritime powers, forbids the attack or bombardment of villages, towns, habitations or buildings which are not defended.

It may be asked, if no fortifications are needed to guard the entrances to the canal, why do we construct them to protect the entrances to our harbors and coast cities? The answer is, that the conditions are entirely different. Fortifications for the protection of a harbor or city on our coast, stand on an entirely different footing from fortifications commanding the entrances to the canal. A town or harbor of the United States can not be cut off from interior support by a fleet outside, no matter how strong the latter may be. The country may be inconvenienced, even greatly inconvenienced, but communications by water with other parts of the nation through a blockading fleet are not essential. The blockade of a city or harbor of the United States is a serious matter, but not vital. If New York were blockaded there are other cities and towns on the coast that would, in a measure at least, supply its place. But the blockade of the Panama Canal is a no less serious matter to the United States, in time of war, than its destruction. So far as its usefulness is concerned, it might just as well be destroyed.

Fortifications commanding the entrances to harbors on the coast are needed to protect them when the navy is absent. A well fortified harbor may even get along without the navy, at least for a time, but at the isthmus the presence of a fleet within striking distance is essential to the safety of the canal if it be threatened by a strong naval power. Fortifications defending a harbor on the coast have the support of the almost inexhaustible resources of a prosperous country behind it. Their strength and the resources behind them will often deter an enemy from attack. On the isthmus they rather

invite attack, for no matter how strong they may be in themselves, when once they are isolated, they become weak, and the presence of a strong fleet outside may isolate them.

The canal is far away, located in a region absolutely devoid of supplies, with practically no roads and dependent wholly, for safety, on the long line of communications over the water. That line can only be maintained by the navy, which means that we must hold naval command of the sea in the vicinity of the canal. If we hold that command, fortifications are unnecessary. If we do not hold it, we can make no use of the canal. Do fortifications commanding the entrances to the canal help the navy in maintaining that control? It may be said that in a measure they do; but to such a limited extent that their cost and other disadvantages more than compensate.

It may be assumed that some part of the navy will always be present at the Isthmus, and in time of threatened danger another and larger part will be within supporting distance. The part that is there permanently may consist only of obsolete battleships and submarines; these will afford all the protection needed against a sudden dash of a few fast cruisers, but nothing less than a powerful fleet will suffice to ward off a real attack or prevent blockade of the canal.

It may be thought that the position of the canal in Central America and its distance from the United States are themselves reasons for constructing fortifications for its defense. But a little thought will dispel that illusion. A fortified canal becomes essentially a military outpost and yet it is radically different from one in its relations to the military powers of the government. An outpost may be abandoned without serious consequences; indeed, sometimes with positive advantage. The military outposts established in Hawaii and the Philippine Islands depend largely on fortifications for defense. As outposts, however, they might be captured, isolated or destroyed, and yet their loss would not entail serious consequences in war. On the other hand, the destruction, capture or isolation of the canal would entail irreparable mischief. The mere presence of a hostile fleet in its vicinity would be so serious a matter that considerable risk would be taken in giving

battle in order to drive it away, and the successful blockade of the canal would be almost as fatal as its destruction. The enemy must be kept at a distance from it, which means that the defense of the canal must be made as far from it as possible.

In order to attack the canal with any prospect of success the enemy must provide himself with coal and supply stations. It must not be necessary to send a ship thousands of miles away to get a supply of coal or to make repairs which are constantly required. These facilities, which can not be readily improvised, must be available close to the canal, and without them a fleet is weakened to the extent that a part of it is always absent. Great Britain and the United States are the only nations that have naval supply stations near the canal, and Great Britain, therefore, is the only single power that we need fear at the present time.

The proximity of some of the strong naval powers to the Suez Canal, renders that canal more vulnerable to attack than the Panama Canal. No European or Asiatic nation can reach the latter without crossing an ocean. Even with good naval bases on this side, the crossing of the ocean by a hostile fleet for the purpose of attacking the canal would be, if the existing relative strength of the navies of the world is maintained, extremely hazardous. We need go no further back than to the Russo-Japanese War to establish this fact.

It is assumed that an army will be placed on the Isthmus in time of war whether fortifications to command the entrances be built or not. A secure line of communications with that army is an absolute necessity, and it can be maintained only by vessels sailing the sea. One overland is an impossibility. In time of war, a stream of vessels will be plying back and forth carrying men, munitions of war, and supplies of all kinds. That line must be protected at any cost. All the fortifications that can be constructed on the Isthmus will avail nothing in keeping that line open, and the little benefit that the navy would get from their construction can be gotten in other ways. To hold the canal without the ability to use it would be like owning a gold mine without the ability to extract the precious metal from it.

If fortifications are to be constructed, their character and extent,

the object they are to fulfil, and the size of the proposed garrison will, of course, be decided on beforehand. When the climatic and other conditions are taken into consideration, it is obvious that no less than double the force required to garrison the more healthful places in the United States will be required. Without undertaking to form an estimate of the force required for this purpose, it is obvious that it would exact a tribute from the Treasury, that would be burdensome and, the chances of Congress failing to make the needful appropriations is a contingency that should not be overlooked. Our policy has been and always will be, to keep our military forces down to the lowest notch until war is actually upon us. Our coast defenses are to-day a source of solicitude owing to the fact that we have scarcely enough men to keep the rust from ruining the guns.

The canal, after it is open to navigation, will become a highway of the world's commerce, for, though the distance between the most important European ports and those of the East, is shorter by way of the Suez route than by way of Panama, still, there will unquestionably be a large foreign traffic through it, and all maritime nations of the world will have acquired rights of navigation that can not be ignored, no matter how inconvenient it may be to ourselves to recognize them. New trade routes will be established which never before existed, and the neutral nations creating them will insist on maintaining them. That this will bring about conditions requiring tact and delicacy in handling can not be doubted. Anything that endangers the freedom of that traffic, such as war between the United States and a maritime power is likely to do, will cause an uneasy feeling on the part of neutrals, and the waters adjacent to the Isthmus will see an accumulation of warships representing those nations. In what way will those conditions affect the question of fortifications? The question answers itself. Fortification and neutralization are not in harmony. According to generally accepted opinions, there can be no neutralization with fortifications and vice versa, the erection of fortifications destroys neutralization. Indeed, the defense of the canal by means of forts, as already stated, is based by its advocates on the theory that there is, in reality, no neutralization of the canal under the Hay-Pauncefote Treaty. As this sentiment

finds adherents in our own country, we must expect others to take that view in other countries. The danger of complication as a result of the construction of fortifications is far greater than the danger to the canal from lack of them.

The canal, so far as respects foreign nations, is, to all intents and purposes, purely a commercial canal. It can not be said to have great military value to any foreign nation, Great Britain alone excepted, and no single nation, not even Great Britain, under existing conditions, could hold it permanently against the power that could ultimately be exerted by the United States. Its loss or prospective loss might induce us to accept terms of peace, that under other circumstances, would not receive consideration, but the inducement of any foreign nation to attack the canal would arise from the injury its loss would be to us and not from the gain to him. Indeed, the capture of the canal by a foreign power might prove to be too heavy a burden for him to carry.

To deprive the United States of its use in war it is not necessary, however, to send a fleet to the Isthmus. A few resolute men landing on the coast nearby could cut an embankment or destroy a lock with a few sticks of dynamite which they could carry on their person. The perimeter of Lake Gatun will be many miles in length, with remote spots where a break could be made in a few hours. Fortifications commanding the entrances afford no protection whatever against this danger. A military police, strong enough to keep up a constant patrol of the weak spots, is what is needed, not forts.

The fear has been expressed that if the entrances to the canal were not defended by fortifications, an enemy in time of war might, by taking advantage of its neutral character, pass through it to attack our cities on the opposite side. Nothing more unlikely to happen could be imagined. No naval commander, be he ever so rash, would be willing to put his fleet so completely at the mercy of his enemy. The canal will have several locks, and when a ship is in one, it will be at the mercy of the lock tenders. When an enemy comes to the canal with the intention of passing through it, he will first try to get possession. To get possession, he must first destroy our fleet which will oppose him outside. After that he must destroy or

capture the army and such part of the navy as will oppose him inside, all of which will be no small undertaking. As a last resort the canal can be disabled by our own forces if needful, to prevent his using it.

In a war between the United States and any single non-signatory power, it is practically certain that with our present naval resources we could keep an unfortified canal open without assistance from any other power. In a war between the United States and a number of non-signatory powers, whose combined strength would be sufficient to menace the safety of the canal, we might reasonably expect that the jeopardized interests of British commerce would come to our assistance, and with British help we could keep the canal open against the world.

When the Russo-Turkish war was in progress in 1877, the British Government, feeling some concern as to the action of Russia in her operations against the Turks with respect to the Suez Canal, sent word to the Russian Ambassador, that

an attempt to blockade or to otherwise interfere with the canal, or its approaches would be regarded by Her Majesty's Government as a menace to India and a grave injury to the commerce of the world. * * * Her Majesty's Government has formally determined not to permit the canal to be made the scene of any combat or warlike operation.

This was ten years before the Treaty of Constantinople. Great Britain "*is determined not to permit the canal to be made a scene of any combat or warlike operation.*" In other words, she did not propose to allow any force to go to the canal with warlike intentions. She would destroy it before it got there. That is the true and only effectual means of defense. Would she not in the same way aid in keeping the Panama Canal open, if the latter be unprotected by fortifications?

Suppose, on the other hand, the war was with Great Britain. Would not the other maritime nations of the world come to our assistance? This is not a safe reliance, it is true, but after commerce has become accustomed to the new route, and new lines of traffic have been established, anything that looks to a possible interruption of traffic would be regarded as a great calamity by all nations. It

is reasonable to expect them to do those things that will protect their interests.

The idea has been suggested that the canal could be made a good base of operations for our navy; that the large fresh water lake would be a convenient place in which to clean the bottom of our ships and assemble them in readiness for service in either ocean. The idea is fallacious. For operations against the South American or Central American states it would be of service, but for operations against any of them, a naval base is not needed, at least, none other than we already possess. For offensive operations against a European or Asiatic power, it is unsuitable as a base. As a means of transferring our fleet from one ocean to the other, or of dividing it and yet keeping the two parts within supporting distance of each other, the canal will be of great value. In fact, this is its greatest value from a military standpoint, but fortifications do not add to the canal's facilities. A wide, deep channel and commodious locks that will enable a fleet to pass from one ocean to the other in the shortest time, is the important consideration.

The canal will possess one drawback as a base of operations. The channels of exit are long and narrow. An inferior fleet on the outside could bottle up a stronger one inside. The length and narrowness of the channels restrict the formation of a fleet coming out to that of a single column of ships at intervals. An enemy on the outside could deploy and concentrate a heavy fire on the leading ship, to which the latter could reply by only part of her battery. The chances are the leading ship would be sunk before she could get out of the canal, thus blockading the channel for these that follow. In Limon Bay the outer end of the channel is some distance beyond the land on which the shore batteries would be built. In Panama Bay this objection would not be so serious, as batteries can be established on islands in the harbor.

We now hold positions in the Carribean Sea and Gulf of Mexico that control, in a measure, the approaches to the canal from the eastward. If we held similar positions in the Pacific, our control on the west side would be greatly strengthened. The Gallapagos Islands are well located for controlling the approaches from the west. These

islands belong to Ecuador, and some of them might possibly be purchased for the purpose stated. There are no other islands in the Pacific Ocean that would serve the purpose so well. With the Gallapagos Islands on one side, and stations already held in the Carribean Sea and Gulf of Mexico on the other, backed by a strong navy, no force from east or west could reach the canal, without exposing its line of communication to a dangerous flank attack. Consequently an enemy would be compelled to take these places first, which could be made a very difficult operation. Our position in respect to the canal ought to be similar to that of Great Britain with respect to the Suez Canal. Commanding as she does the Mediterranean and Red Seas, she holds the keys to both entrances to the canal which gives her complete control, and this she could not get from fortifications covering the entrances alone.

With all the defensive appliances that engineering skill, backed by almost inexhaustible resources, could supply, Port Arthur could not hold out against the Japanese after they got control of the China Sea. Twice within the last twenty years Port Arthur, though strongly fortified, has been taken by the Japanese after securing control of the sea in the vicinity. We took Cuba and Porto Rico after our supremacy on the Carribean Sea had been established. We practically captured the Philippines when Dewey destroyed the Spanish fleet at Manila, which gave us command of the waters of that archipelago. It is extremely doubtful whether or not the British could have subdued the Boers if their control of the sea could have been disputed. Napoleon lost Egypt in the naval battle of the Nile. Great Britain herself can not be invaded as long as she controls the seas around her as she does to-day. Many instances might be cited, showing that a nation's outlying possessions can not be held in a war with a power otherwise strong, that controls the sea in their vicinity. The defenses of the canal is a naval function. If our navy be unable to protect it without the little assistance it would get from fortifications, it will not be able to do so with them.

The canal from a defensive standpoint has an advantage in a double line of communications. The one on the Pacific side is long, but not easily reached by the enemy; that on the Atlantic side is

comparatively short and is more vulnerable. If either be broken, it is probable that the other could be maintained intact, in which case communications with the Isthmus would be kept up. Both would have to be broken to prevent us from reinforcing an army on the Isthmus.

The erection, in time of peace, of fortifications to command the entrances to the canal will give to the maritime nations of the world grounds for believing that in so doing, we are failing to observe the obligations of the Hay-Pauncefote Treaty, and what is worse, the belief would not be without foundation. The United States can not afford to be placed in such an equivocal position. It may confidently be predicted that if we abstain from erecting fortifications the canal will soon come to be recognized and accepted by all nations as a neutralized waterway in the fullest meaning of that term.

If the stipulations of the Hague Convention amount to anything, it is far better to abstain from erecting fortifications, because, in that case the canal will not be in danger of attack. Article XXV of that convention, which was agreed to by all the maritime nations of the world, stipulates that "the attack of towns, villages, habitations or buildings which are not defended is prohibited."

There is a popular belief that if fortifications are built to command the entrances to the canal, it can be kept open to our own ships in time of war and closed to those of the enemy. This is an error. In order that the United States may enjoy the benefits and advantages of the canal in time of war, it is necessary that access to it and egress from it should be free and unobstructed; but access to it and egress from it can only be had, in time of war, while our fleets command the waters near the entrances. If the canal be blockaded by a hostile fleet, it will be of no more use to the United States than if it had never been built. Fortifications will not save it from blockade, no matter how many guns may be mounted to command the entrances.

It must not be forgotten that the Panama Canal is an artificial waterway very unlike a natural one. It is not even like the Suez Canal, which, though an artificial waterway, is at sea level and requires no locks. For a vessel to pass through the Panama Canal she must be lifted up eighty-odd feet above the sea into the summit

level; she then steams across the Isthmus at this level and when she reaches the other side she must be lowered down to the level of the sea again. The actual process, though simple, requires careful management. The locks are themselves, therefore, a safeguard against the use of the canal by an enemy.

It may be asked, why should we construct fortifications for the defense of the Philippine Islands and not for the defense of the Panama Canal? The answer is, that in reality fortifications are not being constructed for the defense of those islands, but rather for that of a base of supplies for our navy. The defense of those islands depends on the ability of the navy to maintain its supremacy, in time of war, over the waters of the archipelago. That requires a naval base in that region. The fortifications are to protect that naval base. The defense of the canal also requires that the navy, in time of war, shall maintain control of the waters in its vicinity, but to do it, a naval base of operations *in the canal* is not necessary.

Suppose the canal to be opened to navigation and no fortifications built to command the entrances. What will happen in case of war with some maritime nation or nations capable of crossing either ocean with a fleet strong enough to drive ours off the sea and threaten the safety of the canal? How are we to meet that emergency under the conditions assumed that we have no fortifications commanding the entrances?

It is safe to assume that our standing as a naval power will not be any lower with reference to other powers than it is to-day. The probabilities are that it will be higher by the time the canal is opened to navigation. It may, therefore, be assumed that a strong American fleet at no great distance from the Isthmus will always be available for defense. The enemy may come from different points of the compass, but he will endeavor to unite all his forces before he comes in contact with ours. He will not come from the East and the West at the same time; that would expose him to being beaten in detail, as our forces would have a great advantage in shifting from one ocean to the other through the canal.

The first thing the attacking fleet must do is to get ours out of the way, either by destroying it or shutting it up in some harbor, or

by so severely crippling it that it will be unable to assume the offensive. A naval battle is, therefore, the first thing to be anticipated, and considerable risk will be taken by both sides in bringing it about. The enemy will seek it because it is necessary for the success of his next operation, ours will not decline it unless it is apparent that the odds are strongly against us, because, even though the enemy be not defeated, he may be so crippled that he can not continue his movement against the canal. If that battle results in the defeat of the enemy, the danger of attack is over. If, on the other hand, our fleet should be beaten, the way to the canal will be open to the enemy. Under any circumstances, it is certain that the enemy's fleet will suffer considerably in this fight even though it be victorious. It is problematic, therefore, whether he will continue his movement or not. Suppose, however, that he does continue it, what will be his next move?

The line of communications with the United States on the side on which the battle takes place will be broken, but the one on the opposite side remaining intact, reinforcements of troops would be pouring into the Canal Zone and all available naval forces on that side would assemble there. The enemy might then demand the surrender of the canal, but this would, of course, be refused. It is improbable that he will bombard the entrance. There will be little or no advantage in that; on the contrary, the rules of war, the damage to foreign shipping that would inevitably result, and the indignation of the civilized world, would forbid. Will he risk sending his ships into the canal? As only one ship could fight at a time, all advantage of preponderance of power would be lost. His fleet would not enter the canal until control of it had been secured, and in order to get control he must land troops and clear the country. These will be landed under cover of the guns of the fleet and then the struggle will be on land. As our land forces ought to be stronger than those of the enemy and our position better, the task laid out for him will not be an easy one. If the enemy should get possession of one end of the canal while our forces hold the other, it would be useless to both and could be destroyed by either.

The enemy, if strong enough, may detach a part of his fleet,

sending it around the Horn or through the Straits of Magellan to cut our communications on the opposite side of the Isthmus. With these cut, and the enemy in command of the sea on both sides, it would only be a question of time when our forces would be compelled to yield. If this movement be too dangerous or involves the loss of too much time, he may prefer to fight it out on land, advancing from the side on which a landing had been effected. To accomplish all this, however, would be a stupendous accomplishment and the danger of failure in some part which would be fatal to the whole, would cause an enemy to hesitate in undertaking it. To insure success he must come in overpowering force, which we are scarcely justified in assuming. The most powerful maritime nation would not send its entire navy on such an errand, while we might put every ship we possess into the defense.

In these supposed operations no account has been taken of the effect a few submarines would have. But that the moral effect of their presence would have a restraining influence on the enemy's operations can not be doubted.

Suppose that instead of the canal being open and undefended there are heavy guns and mortars mounted at the entrances, mines laid and some guns of light caliber to cover the mine fields. That is all that is needed or proposed to command the entrances. What part would these play in the defense? They might compel the enemy to land at some other place than at the entrance to the canal, but as there are many places nearby where a landing can be made, that would cause him no serious difficulty. If the army, without permanent fortifications, could not prevent a landing at the entrance, one with them could not prevent it from being made nearby and the fortifications would then be taken in reverse.

It will thus be seen that fortifications commanding the entrances add little or nothing to the defense under the conditions assumed, which for the United States are the worst that can be imagined. Under more favorable conditions there would be still less need for them.

To sum up, it may be stated,

First, that the canal is liable to be damaged by a few men to such an extent that a suspension of navigation is inevitable; but that fortifications commanding the entrances will afford no protection whatever from this danger.

Second, that the apprehended danger of a hostile fleet passing through the canal in time of war, if there be no fortifications, is imaginary.

Third, the danger of bombardment is imaginary. The laws of nations forbid it. But if the laws of nations be defied, the locks and other accessories are all so far inland as to be beyond the range of the guns of enemies outside.

Fourth, an attack by a combined land and naval force is unlikely, but is possible. To prevent that, every place along the coast near the canal, where a landing could be made, should be occupied. To mount guns commanding the entrances to the canal will not suffice. If an attack be made by a force sufficiently strong, and it is inconceivable that it would be made by a weak one, fortifications commanding the entrances would not save it.

Fifth, the blockade of the canal is the danger most to be feared. That can only be made effective by a naval force stronger than ours and after a battle on the sea. Great Britain is the only nation that has a naval force strong enough to blockade the canal and she has renounced the right to do so by the Hay-Pauncefote Treaty.

Sixth, when the canal is open to navigation, it will become a coal-ing station for commercial as well as naval vessels. Possibly docks may be constructed and both should be protected, but both the coal pile and the docks will be inland beyond the reach of an enemy's guns on the outside. It will therefore be necessary for an enemy to come inside the canal to steal the one or damage the other. This will be prevented by the naval force that will always be present.

Seventh, fortifications commanding the entrance to the canal may be supposed to afford shelter to a defeated fleet which an open and unprotected one would not. But a victorious enemy would be compelled to enter the canal in any case to get at ours, and it is not conceivable that he would do so. The canal as a last resort, could be destroyed, if necessary, to prevent its falling into his hands. Its destruction

would be no more disastrous to the United States than the loss of ability to use it.

A scrupulous regard for the obligations of treaties is an evidence of a nation's high standing in the scale of civilization, as a disregard of them is an evidence of low standing. In ancient times it was customary to exact hostages to insure the fulfilment of treaties, now the merited reproach of other nations is generally sufficient to insure their observance. The United States can not afford to place itself in antagonism to this moral sentiment, for though, sometimes, even civilized people may not be held in check by it, still it has a restraining influence, and that influence is felt more and more as nations grow older, and rise higher in the scale of civilization. There can be no doubt but that the Hay-Pauncefote Treaty was made with a view of neutralizing the canal; if it fails to accomplish that purpose there is still time to correct its defects; these should not be left until it is too late. But it is confidently claimed that the treaty does neutralize the canal, that such is the almost universal understanding, and that the construction of fortifications commanding the approaches thereto will destroy neutralization. Nothing short of the most imperious necessity would therefore justify the United States in constructing them, and no such necessity exists.

PETER C. HAINS.

THE MOST-FAVORED-NATION CLAUSE

History

The phrase "most-favored-nation" first appeared in commercial treaties toward the close of the seventeenth century. The clause in which it was used had been invented earlier in the century to meet the exigencies of that great commercial expansion which had followed upon the restless activities of the fifteenth and sixteenth centuries. The growth of international trade in the eighteenth century called for the multiplication of commercial treaties, and with the treaties the necessity for using the new clause increased.

After the American revolution, a series of treaties were made in which the clause was given an expanded and modified form. Henceforth there appear both the unqualified and the qualified forms. During the nineteenth century, while international trade became world commerce, commercial treaties became so common that they now bind the trading nations in a fine-meshed web. In these treaties the clause of the most-favored-nation was inserted with so few exceptions as to warrant its characterization as the "corner-stone of all modern commercial treaties."

Rarely does a conditional provision so extensively used and so vital in its bearing upon economic relations escape misinterpretation and avoid becoming the source of misunderstanding. The experience of this clause has been no exception to the rule. All through the diplomatic correspondence of the last century there appear constant disagreements and ever-recurring irritation over what is the meaning and what are the obligations attaching to this or that clause. In view of these facts it is somewhat surprising that only recently has the clause been made the subject of special study. True, each of the more important treatises upon international law and many works upon international commerce have given it notice, while numerous articles have dealt with it briefly. The diplomatic correspondence which it has occasioned would fill many volumes. Wharton's Digest

of International Law (1887) and Moore's Digest (1906) contain excellent summaries of some of this. But no monographic study appeared until the work of Mr. Herod, which was published in 1901.

The changes in world politics which ushered in the twentieth century have vastly increased the general interest in questions which affect international, and especially commercial, relations. This widening of the political horizon has already borne fruit in the relatively immense crop of monographs which has appeared within the last decade. In this new consideration of living problems the most-favored-nation clause has begun to receive some of the attention which its importance merits.

Mr. Herod's "Most-favored-Nation Treatment" discusses the clause in general but with reference especially to the historical and legal basis for American practice. In 1902 M. Visser produced an article which furnishes a careful resumé of the history of the clause and a discussion of the chief points in the controversies to which it has given rise. Since then several German writers, especially Calwer, Kaufmann, Glier, and Shippel, have devoted very considerable attention to numerous phases of the subject. Dr. Glier's work represents an elaborate study of commercial treaties and is of particular value as an index and guide. A serious study of the history and legal aspects of the clause appears in Sig. Cavaretta's book. Certain South American writers have recently contributed to the discussion. However, with the exception of Mr. Herod's book, practically no concise treatment has appeared in English.¹

De Martens has classified commercial treaties as containing three kinds of clauses:

¹ *Select Bibliography*: Barclay: Problems of International Diplomacy, Boston, 1907; Borchardt: Entwicklungsgeschichte der Meistbegünstigung in Handelsvertragssystem, 1906; Cavaretta: La clausola della Nazione più Favorita, Palermo, 1906; Calwer: Die Meistbegünstigung in Vereinigten Staaten von Nordamerika, Berlin, Berne, 1902; Glier: Die Meistbegünstigungs-Klausel, 1905; Herod: Favored Nation Treatment, New York, 1901; Kaufmann: Welt-Zuckerindustrie und Internationales und Koloniales Recht, Berlin, 1904; Lehr: La clause de la nation la plus favorisée, Rev. Droit Internat., 1893, pp. 313-316; Moore: Digest of International Law, Vol. V, 257-319, Washington, 1906; Philbert: De la liberté du commerce dans les traités de commerce, Paris, 1902; Schippel: Amerika und die Handelsvertragspolitik, 1906; Schraut: System der Handelsverträge und der

1. Those relating to the subjects or citizens of the contracting powers in regard to their civil rights;
2. Those relating to rights reciprocally granted to the subjects in all that concerns navigation;
3. Those which concern commerce properly speaking.²

As the clause of the most-favored-nation covers commerce, navigation, and the rights of subjects and citizens, we may expect to find it in treaties of all these classes.

These treaties cover, of course, a wide variety of subjects. They include importation, exportation, transit, transfer, and warehousing of merchandise; customs, tariffs, navigation laws; quarantines; tolls upon water courses and canals; the stay of boats in roadsteads and docks, and the deposit of merchandise in customs warehouses; coasting trade; the admission of consuls and their rights; stipulations which govern the respective subjects of the contracting powers in the possession and transmission of personal and real property; payment and exemption from extraordinary levies and forced loans; service in the army and militia; conditions of citizenship; establishment of consuls, etc., etc.³

Every state has a two-fold object in its international politico-commercial arrangements: to gain and to preserve the greatest possible advantages, and to guard against present or future disadvantages and discriminations. In making treaties with this object in view, the clause of the most-favored-nation has been found one of the most convenient and effective instruments, especially for the attainment of the latter end. In substance, the clause deals with the treatment which citizens or subjects of each of the contracting powers shall receive in the territories and at the hands of the other, especially in matters of navigation and commerce. Favors in navigation and commerce extend to the articles, the agents, and the instruments of

Meistbegünstigung, Leipzig, 1884; Visser: *La clause de la nation la plus favorisée*, *Rev. Droit Internat.*, 1902, pp. 66-87, 159-177, 270-280; Von Melle: *Die Meistbegünstigungsklausel*, In *Holtzendorff's Handbuch der Völkerrecht*, III, pp. 204-214 and ff, Berlin, 1889; Great Britain, *Parl. Papers, Commercial*, [No. 9. (1903).]; U. S. *Treaties in Force 1904*, Washington, 1904.

² De Martens: *Droit international*, Tome II, pp. 314-315.

³ Calvo: *Droit international*, III, 1597.

commerce. The object sought is uniform treatment without discrimination.⁴

In the simplest form of the clause the contracting parties agree that in all that respects commerce and navigation, any privilege, favor, or immunity which either grants to a third state shall be granted to the other.

The shortest way by which to arrive at an understanding of the position of the clause in modern treaties is to go to its origin and to trace it in its evolution, that is, to study it historically. Two inevitable conclusions will be derived from such a course. To state these in advance will greatly simplify the demonstration. In the first place, the clause had a two-fold origin, and usually the two-fold object suggested above — it was at once a political and an economic instrument. In the second place, two leading schools of interpretation have grown up, the one demanding a strict, or literal, interpretation of the words of the clause, the other insisting upon a practical, and more political, interpretation. Of the leading exponents of these radically different interpretations, the nation which holds to the former, Great Britain, is at the same time the greatest exponent of the principles of free trade; while the nation which insists upon the latter, the United States, is the foremost advocate of the theory and practice of protection.

Most writers on international law, inferring from the fact that in its practical development the clause of the most-favored-nation has been most frequently applied as a regulator of commercial relations, affirm that it owes its origin to a movement eminently economic. Sig. Cavaretta points out, however, that in its first appearance, it was due to political rather than economic exigencies, although these were of course closely allied with elements of an economic character. He discovers the embryo of the clause in the treaty of November 8, 1226, in which the Emperor Frederick II conceded to the city of Marseilles the privileges previously granted to the citizens of Pisa

⁴ "It is clearly evident that the object sought in all — is equality of international treatment, protection against the wilfull preference of the commercial interests of one nation over another." — Mr. Sherman's note to Mr. Buchanan, Jan. 11, 1898. Moore, *op. cit.*, Vol. V, p. 278.

and those of Genoa. These concessions were dictated by political motives.⁵

Although the practice of granting reciprocal favors and the theory of favored nations had existed much earlier than this treaty, and although this example was followed with modifications during succeeding centuries, it is not until the seventeenth century that the real clause of "the most-favored-nation" makes its appearance in written treaties.⁶

Previous to this time the number of nations engaged in international commerce, as regulated by treaties, was small. Trade was really carried on by the adventurous few, and was, as a rule, either sporadic or governed by monopolies. As world commerce increased in the fifteenth and sixteenth centuries, as England and Holland set themselves to compete with Spain and Portugal, and the French and Scandinavians commenced to dispute the supremacy of the Hanseatic League and the waning power of the Italian Republics, conditions were changed. Treaties became necessary and frequent. In order to avoid repetition, a clause was framed which should refer back, embrace the conditions of the treaties already existing, and extend their provisions to the newly contracting states. This clause was that of the "most-favored-nation."

Not only did this clause generalize previous provisions, it performed a more important function, namely, to safeguard the state in whose treaties it appeared against future discriminations. This made it at once of great importance. Thus M. Visser finds the principal cause for its extensive use in the economic necessity which forced each state, in the clash of international commercial competition, to guard against falling into a position of disadvantage.⁷

In the beginning, this extension of favors was made but to one or two specified states. For instance, in the agreement, July 6, 1612, between the United Provinces and the Porte, the former secured the same advantages which had already been granted to Great Britain

⁵ Cavaretta, *op. cit.*, 59.

⁶ For a detailed study of analogies to the clause in early times, and of its historical development, compare Cavaretta, *op. cit.*, pp. 12-61.

⁷ Visser, *op. cit.*, 78.

and France. The next step was to extend the advantages to include such favors as should be granted to certain other specified nations; then to include advantages granted to *any nation whatsoever*. Thus, article 4 of the treaty between Great Britain and Portugal, January 29, 1642, specifies that subjects of Great Britain shall enjoy all the immunities accorded the "subjects of any nation whatsoever in league with the Portugals." This treaty is regarded as marking a turning point in the economic and political fortunes of both nations. The treaty of February 13, 1661 between Great Britain and Denmark contains the words (article 11) "people of any foreign nation whatsoever."⁸ The Anglo-Danish Treaty of November 29, 1669 contained the phrase "whatsoever foreign nations." A treaty in September, 1675, between Great Britain and the Porte extends the favors of this grant to "whatsoever other Christian Nation," (article 3); while that of August 16, 1692, between Denmark and the Hanse cities, contains the phrase "most-favored-nation," (article 6).

In the eighteenth century, the treaty of commerce became of great importance, and with it the importance and the frequency of the appearance of the clause increased.⁹ The regime of the monopoly and of the mercantile system gave rise to reciprocal commercial arrangements between nations, and the gradual opening of world commerce. The success of the American Revolution was of the greatest importance in all that relates to commerce. Soon after the Declaration of Independence the United States began making treaties with European nations. In nearly all the treaties which were then and subsequently made by the United States, the clause of the most-favored-nation was inserted, but in a form which, for the first time, provided that the advantages to be accorded were to be in return for an *equivalent*. The treaty with France, February 6, 1778, contains the first example of this new development. There in article 2, it is agreed that the favors which either of the con-

⁸ Cf. Treaty between Portugal and the United Provinces, August 6, 1661.

⁹ See Treaties, England-Portugal, Dec. 27, 1703; England-Spain, Dec. 9, 1713; England-Spain, Dec. 14, 1715; England-Spain, Oct. 5, 1750; England-Sweden, Feb. 5, 1766; Prussia-Saxony, June 18, 1766; England-Russia, June 20, 1766; Portugal-Denmark, Sept. 26, 1766.

tracting parties shall grant to any other shall be immediately extended to the other "freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional."¹⁰ Treaties with Sweden, April 3, 1783, and Prussia, September 10, 1785, contain similar stipulations. With the making of these treaties, there begins the development of the so-called "American interpretation."

The clause now enters upon a third phase, that in which it is used as an instrument to regulate the multiplex counter-rights of the subjects of the contracting parties.¹¹ During the nineteenth century, the use of the clause increased and became so common, in one or another of its various forms, that its appearance came to be looked upon almost as a matter of course. Schmoller has characterized the clause as the "volkerrechtlichen Eckspfeiler aller neueren Handelsvertr ge." The clause was regularly inserted in the treaties of the Zollverein. It was a regular feature in the treaties fashioned under the new commercial policy of Napoleon III. It forms the basis of the present commercial relations of France and Germany. It appears in most of the commercial treaties of the United States and Great Britain. It is prevalent in that large group of European treaties which were made in the last ten years of the century. The German treaties contain it in practically absolute form. France holds to it as far as possible in spite of her adoption of the double tariff.¹² Spain developed an elaborate commercial policy, meaning to rid herself of the cramping restrictions of the clause, but in practice she has succeeded only to a very limited extent in effecting this exclusion.¹³ Portugal, with a similar policy, has succeeded in making very few treaties without this clause. Switzerland has opposed the clause but has continued to use it. It occurs regularly in the new Japanese treaties and in recent

¹⁰ In making this treaty, it may be observed, France was considering her political even more than her economic interests.

¹¹ Cf. Cavaretta, *op. cit.*, 50 ff.

¹² Cf. Visser, *op. cit.*, 72-74.

¹³ In a treaty with Japan, Jan. 2, 1897, art. 14, Spain accords Japan most-favored-nation treatment as regards customs duties; and Nov. 13, 1899, the products of Holland were accorded by Spain the most-favored-nation treatment.

Chinese treaties, having in several of each a very wide extension. Some South and Central American states have abrogated their commercial treaties with the object of getting rid of the clause in its unlimited form. Chile, Costa Rica, Dominica, Guatemala, and Uruguay denounced their commercial treaties with European countries, thinking these treaties an obstacle to their project of forming a customs-union, but Argentina and Paraguay have accepted and retained the most-favored-nation clause.¹⁴ We may conclude that as commercial treaties exist to-day, they generally contain this clause in some form, and that attempts to get rid of it have not been conspicuously successful.¹⁵

It may perhaps be said that a fourth phase in the history of the clause has begun with the rise of the system of double tariffs. The French system of double tariffs was introduced with the affirmed object of freeing the legislature from the checks imposed by the régime of treaties of commerce.¹⁶ Spain, Russia, Germany, and Norway, and, in America, Brazil and Argentina have to some extent imitated the French in the use of this system. What effect this new development has had or may have upon the clause of the most-favored-nation will remain to be dealt with in a further chapter.

In order to simplify the study of the clause as it appears in many treaties, we may first consider the limitations within which it operates and the general forms in which it occurs. It is not intended that the clause shall operate so as to affect the internal policy of the state; it applies solely to treatment of foreign states, that is, to the relative treatment of the citizens and the commerce of foreign states.

¹⁴ Cf. Treaties, Argentina-Italy, June 1, 1894; Argentina-Norway and Sweden, July 17, 1885; Paraguay-Italy, Aug. 22, 1893; Paraguay-Belgium, Feb. 15, 1894.

¹⁵ "On peut donc dire que les traités de commerce se basent en général sur le traitement de la nation la plus favorisée. Presque tous les traités contiennent une clause garantissant ce traitement d'une manière plus ou moins étendue, et le petit nombre d'États qui ont essayé de s'y soustraire n'y ont réussi que fort peu. Il s'entend que les exceptions faites en ce qui concerne le commerce frontière, les relations avec les États avoisinants ou la faculté de conclure une union douanière n'enfreignent pas le principe d'une manière importante. Ces réserves ne présentent que peu d'intérêt ou sont expliquées par les nécessités du voisinage." (Visser, *op. cit.*, 77.)

¹⁶ Cavaretta, *op. cit.*, 53.

It is not usually considered as comprehending special arrangements and reciprocity between nations, where on account of proximity or special circumstances, reason exists for relations which cannot be shared by the world at large.¹⁷ Special relations between a colony and the mother country are generally understood to be exempt from the operation of the clause. The term "most-favored-nation" is sometimes replaced by "most-favored-foreign-nation," though even where not so specified, that meaning is understood, as the contracting parties do not mean, for the purpose of the clause, that reciprocal relations between themselves and their colonies shall be considered as standards for most-favored-nation treatment.

With these exceptions, the scope of the clause appears to be limited only by its wording and the interpretation put upon that wording. The clause sometimes stipulates that whatever advantages are accorded by either contracting party to a third state shall extend to the other; sometimes, that this shall be so without equivalent; sometimes forbids putting obstacles to the commerce of one which are not extended to the commerce of other nations. In some clauses there exists a limitation including or excluding certain nations; again the advantages are specified or limited; sometimes the articles which are to enjoy special treatment are enumerated.

An analysis and arrangement of the forms in which the clause occurs leads to the following classification.¹⁸

Form 1. The *form of simple transfer*, which grants a privilege without reciprocity or condition. This often appears as a unilateral provision, especially in treaties between Christian or highly-civilized and non-Christian or semi-civilized, states, whereby the favors are extended to the former without reciprocity. In this form,

One state grants to the other all the privileges granted to any other.¹⁹

¹⁷ Cf. Herod, *op. cit.*, 112-115; Visser, *op. cit.*, 162. Treaty between Great Britain and Uruguay, July 15, 1899; treaty between United States and Ecuador, June 13, 1839; treaty between Holland and Portugal, July 5, 1894.

¹⁸ Cf. classification by Herod, *op. cit.*, pp. 5-7; and Cavaretta, *op. cit.*, pp. 8-9.

¹⁹ In the treaty between Japan and Great Britain, Oct. 14, 1854, article V provides: "In the ports of Japan either now open or which may hereafter be opened to the ships or subjects of any foreign nation, British ships and subjects shall be entitled to admission and to the enjoyment of an equality of advantages with those

Form 2. The *specialized reciprocal form*, which applies only to favors mentioned in the treaty. For instance,

No other or higher duties shall be imposed by either of the high contracting parties on the importation of any article, the growth, produce or manufacture of the other, than are or shall be payable on the like articles, being the growth, produce or manufacture of the most-favored-nation.²⁰

Form 3. The *simple reciprocal form*.

The high contracting parties agree that, in all that concerns commerce and navigation, favors which either has granted or may hereafter grant to any other state shall be granted to the other party.

This includes the majority of British treaties.²¹

of the most-favored nation, always excepting the advantages accruing to the Dutch and Chinese from the existing relations with Japan." In the treaty between China and the United States, Oct. 8, 1903, article III provides that citizens of the United States in the open or hereafter opened ports of China "shall generally enjoy as to their persons and property all such rights, privileges, and immunities, as are or may hereafter be granted to the subjects or citizens of the nation the most favored in these respects."

²⁰ Treaty between China and United States, July 28, 1868, article 6, specifies for most-favored-nation privileges as regards *travel* and *residence*. In the treaty between France and Italy, Nov. 3, 1881, article 17 provides that each contracting party engages to allow the other to profit by any privilege or lowering of the tariff duties on the *importation* or *exportation* of articles, whether mentioned or not in the treaty, which one of them has accorded or shall accord to a third power. (The terms of the treaty not to apply to articles which are the objects of state monopoly.) Treaties between France and Honduras, Feb. 11, 1902; France and the Dutch Colonies, Aug. 13, 1902; and France and Nicaragua, Jan. 27, 1902, provide for most-favored-nation treatment as regards duties on importation and exportation of specified articles. The form adopted in the treaty between Great Britain and Uruguay, July 15, 1899, specifically restricts the application. "The stipulations contained in the treaty * * * do not include cases in which the Government of * * * Uruguay may accord special favors, exemptions, and privileges to the citizens or the productions of the United States of Brazil, or of the Argentine Republic, or of Paraguay in matters of commerce. Such favors cannot be claimed in behalf of Great Britain on the ground of the most-favored-nation rights as long as they are not conceded to other states." See treaties between United States and Great Britain, Nov. 19, 1794, article 15; Holland and Spain, July 12, 1892, articles 2, 6; Holland and Italy, Nov. 24, 1863, article 2; Holland and Austria-Hungary, March 26, 1867, article 2.

²¹ In the treaty between Great Britain and Serbia, June 28-July 10, 1893, articles I, II provide: "The two contracting parties engage reciprocally not to accord to subjects of any other power in matters of navigation or commerce any

Form 4. The *imperative or unconditional form*.

The high contracting parties agree that all favors, etc., in all that concerns commerce and navigation which either has already granted or may hereafter grant to any other state, shall immediately and without condition become common to the other party.²²

Form 5. The *qualified, or conditional, reciprocal form*.

The high contracting parties agree that in all that concerns navigation and commerce, favors which either has already granted or may hereafter grant to any other state shall become common to the other party *who shall enjoy the same freely if the concession is freely made, or upon allowing the same compensation if the concession was conditional*.

This form appears in most of the treaties of the United States. It also appears in nearly all Japanese treaties, and is followed by

privilege, favor, or immunity, whatever, without extending them during the duration of the said concessions to the commerce and navigation of the other party, and they will enjoy reciprocally all the privileges, immunities, and favors which have been or shall be conceded to any other nation." In that between Japan and China, July 21, 1896, article 4 grants, "in all respects the same privileges and immunities as are now or may hereafter be granted to the subjects or citizens of the most-favored nation." A convention between Austria-Hungary and Mexico, Sept. 17, 1901, grants "Most-favored-nation treatment not only as regards importation, exportation, transit and in general everything relating to commercial operations and to navigation, but also in carrying on of business and of manufactures and the payment of taxes in connection with them." Cf. Treaties between United States and Great Britain, July 3, 1815; Great Britain and Netherlands, Oct. 27, 1837, article I; Russia and Great Britain, Jan. 12, 1859, article X; France and Mexico, Nov. 27, 1886, article II; Germany and France, May 10, 1871, article XI; Servia and Greece, June 17, 1894; Roumania and Bulgaria, March 4, 1895; Belgian Treaties with Denmark, Greece, and Sweden, 1895; and English Treaties cited *infra*.

²² The treaty between Germany and Austria-Hungary, Dec. 6, 1891, as amended and completed Jan. 25, 1905, provides that no more favorable conditions in respect of import, export, or transit duties shall be granted by either contracting party to a third power than shall be accorded to the other party, and that any concession of this kind made to the third power shall *at once* be applied to the other. Any dispute relating to these provisions to be referred to arbitration (article 23a). In the treaty between Great Britain and France, Feb. 28, 1882, it is provided that " * * * with the exception above stated each * * * engages to give the other immediately and unconditionally the benefit of every favor, immunity, or privilege in matters of commerce or industry which has been or may be conceded by one * * * to any third nation, whatsoever, whether within or beyond Europe." Cf. treaties between Great Britain and Italy, June 15, 1883, article 11; Russia and Denmark, Mar. 2, 1895, article I.

certain South American states. The modifying or conditional clause "freely if — freely made," etc., contains the principle which the United States secretaries have consistently claimed shall govern the interpretation of the clause whether included or not.²³

That Great Britain and the United States follow forms outlined in the third and fifth classes respectively is significant of their respective attitudes as concerns the intention and the proper interpretation of the clause. It may be laid down that, in general, throughout Europe the clause has been treated as applying to all reductions of tariff without distinction. The United States on the other hand, and such nations as have followed its interpretation, have consistently distinguished between reductions of a general character or those made gratuitously, and those made specifically in return for reductions or an equivalent granted by the other state.²⁴ The central feature in the practice of the United States has been the principle of reciprocity. As has already been pointed out, the special limiting clause which expresses the American idea and forms the basis of the American interpretation was first inserted in treaties made by the United States. A survey of American commercial treaties shows that the United States has regularly adhered to this principle. The limiting clause has been omitted in a few cases,²⁵ and one or two cases of irregular interpretation have occurred.²⁶

²³ Treaty between United States and Japan, Nov. 22, 1894, article XIV provides: "The contracting parties agree that in all that concerns commerce and navigation, any privilege, favor, or immunity which either has actually granted or may hereafter grant to * * * any other state shall be extended to * * * the other high contracting party *gratuitously if the concession in favor of that other state shall have been gratuitous, and upon the same or equivalent conditions if the concession shall have been conditional; it being their intention,*" etc. Cf. treaties between Argentine Confederation and Prussia, Sept. 19, 1857, article III; and Argentine Confederation and Japan, Feb. 3, 1898, article IV. For complete list of U. S. treaties containing this form, 1778-1887, cf. Herod, *op. cit.*, 13, note. Cf. treaties between Portugal-Prussia, Feb. 20, 1844, article XII; England-Liberia, Nov. 21, 1848; Zoll-Verein-Netherlands, Dec. 31, 1851, article XXXIII; Holland-Liberia, Dec. 30, 1862, article XI; North Germany-Liberia, Oct. 31, 1867, article VI; and modern Japanese treaties.

²⁴ Cf. Barclay: Problems of International Diplomacy, 137.

²⁵ Treaties between United States and Great Britain, July 3, 1815; United States and Switzerland, Nov. 25, 1850.

²⁶ Cf. *infra*, p. 410.

American diplomatists have, however, with remarkable unanimity, maintained that in spite of the most-favored-nation clause, and even though the clause itself may not contain an express stipulation to that effect, a nation may always require an equivalent for concessions demanded under the operation of the clause.

You will doubtless have understood that where the words "qualified" and "unqualified" are * * * applied to the most-favored-nation treatment, they are used merely as a convenient distinction between the two forms [which] such a clause generally assumes in treaties, one containing the proviso that any favor granted by one of the contracting parties to a third party shall likewise accrue to the other contracting party, freely if freely given, or for an equivalent if conditional — the other not so amplified. This proviso, when it occurs, is merely explanatory, inserted out of abundant caution. Its absence does not impair the rule of international law that such concessions are only gratuitous (and so transferable) as to third parties when not based on reciprocity, or mutually reserved interest as between the contracting parties. This ground has been long and consistently maintained by the United States.²⁷

The United States first had occasion to define its position expressly and to defend it vigorously in the controversy which arose over the provisions of the treaty of April 30, 1803, with France, article VIII of which provides:

In future and forever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most-favored-nation in the ports above mentioned.²⁸

When, subsequently, under the operation of the reciprocal agreement between the United States and Great Britain, July 3, 1815, the ships of the latter enjoyed a national treatment in the harbors of the United States, which was not allowed to the ships of France, the French government, while refusing to grant an equivalent to the United States, demanded the same treatment which was accorded to England, insisting upon the literal interpretation of the most-favored-nation clause, contending that "a clause which is absolute and unconditional can not be subject to limitation or any modification whatever." The United States government emphasized the

²⁷ Mr. Bayard to Mr. Hubbard, July 17, 1886, MS. Inst. Japan, III, 425, Moore, *op. cit.*, V, 273. Cf. *Whitney v. Robertson*, (1888) 124 U. S. 190.

²⁸ Moore, *op. cit.*, V, 257-260. American State Papers, F. R., Vol. V.

equivalent. The French replied that France had given an equivalent at the time of the cession of Louisiana. The United States argued for a more specific equivalent, saying that if they were to give France *freely* that for which England had paid, France would be enjoying a treatment more favored than that of the most-favored-nation. This was the position held by Mr. Adams, President Monroe, and Mr. Gallatin, whose notes have been repeatedly quoted by United States Secretaries.

But the allowance of the same privileges * * * to a nation which makes no compensation, that have been conceded to another nation for compensation, instead of maintaining destroys that equality * * * which the most-favored-nation clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price.²⁹

To M. Visser, this argument appears beside the point. He fails, however, to show conclusively just how it is so. Although it is true that "if, on examination, it appears that the third nation possesses a certain favored treatment, it matters little to others in what manner the third has obtained it,"³⁰ this does not make a breach in the soundness of the general contention of the United States. The whole difference may finally be sifted down to a distinction between the two views as to what constitutes "a favor."³¹ It is this difference of opinion which causes M. Visser to characterize the American argument as a "jeu de mots."³²

In 1821, Monroe worded our doctrine clearly in his message to Congress. In 1823, Mr. Gallatin stated expressly that the omission of the limiting clause made no difference and that where it was inserted it was merely explanatory and inserted "out of abundant caution." This was again stated by Mr. Livingston in 1832.

The treaty of the United States with Colombia, Oct. 3, 1824, provided that advantages given by either nation to a third party should be extended to the co-contractant, "freely if the concession was freely made," upon "compensation if the concession was con-

²⁹ Mr. Sherman to Mr. Buchanan, Jan. 11, 1898, Moore, *op. cit.*, V, 278.

³⁰ Visser, *op. cit.*, 273.

³¹ Cf. Barclay, *op. cit.*, 138 ff.

³² Cf. Visser, *op. cit.*, 273, and Cavaretta, *op. cit.*, 99.

ditional." Later the United States claimed the right to certain advantages which Central America was enjoying under a treaty with Colombia. When the Colombian government pointed out that its treaty with Central America was made upon a reciprocal basis, the United States conceded that its claim was unwarranted, and proceeded to arrange to grant to Colombia an equivalent for the advantages which were demanded.³³

The treaty of May 1, 1828, between the United States and Prussia, under the provisions of which Germany has made repeated claims against the United States, contained ten articles on the subject of reciprocal commercial relations. Article 9 specifies that any favor granted to a third nation by either of the contracting powers shall immediately become common to the other, but adds the conditional clause. A simple illustration of the rights which Germany has claimed by virtue of this most-favored-nation clause is that made in 1894, that German salt should be allowed to enter ports of the United States, duty free. At the same time American salt was subject to duty in the ports of Germany. Secretary Olney answered that the position of the German government was absolutely untenable; that the principle the United States has regularly maintained was that of reciprocity; and that this position had already been acquiesced in by both Germany and Great Britain.³⁴

When Austria, under the treaty of August 27, 1829, claimed that her wines should enter the United States at the same rate as did the French wines under the treaty of 1831, the United States government pointed out the difference between favors freely granted and reciprocal advantages, and at the same time suggested that no nation intends to bind itself by a condition which will render it unable to make further treaties, a fair interpretation of the most-favored-nation clause being, that, "if the duties were lessened in favor of any other nation, the contracting parties should obtain a like reduction for the same equivalent."³⁵ The United States has carefully avoided placing itself in a position where its liberty as

³³ Moore, *op. cit.*, V, 280.

³⁴ Cf. *infra*, pp. 412, 414.

³⁵ Moore, *op. cit.*, V, 261.

regards future negotiation will be restricted or where other nations shall enjoy privileges in trading with us which we do not enjoy in return.³⁶

After the conclusion of the reciprocity treaty of the United States with France, May 28, 1898, the Swiss demanded for Swiss imports into the United States the same concessions made to France. Their claim was based upon the treaty between the United States and Switzerland of November 25, 1850, which provided reciprocal most-favored-nation treatment in all that relates to importation, exportation, and transit, and that no favors in commerce should be granted by either to a third nation which should not immediately be enjoyed by the other, etc. It was shown that there was no conditional clause in this treaty and that by the understanding between the negotiators Switzerland had been given a "full and unlimited guarantee of the fullest most-favored-nation treatment." The United States government, having examined the original correspondence, declared that "both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect," although this formed an exception to the otherwise uniform policy of the United States. The customs officers were instructed to extend to imports from Switzerland the same rates imposed upon similar French goods under the recent agreement. Germany and other states soon claimed the same treatment. On March 23, 1899 the United States gave notice of its intention to stop the operation of the articles in question in the Swiss Treaty and they ceased to have effect March 23, 1900.³⁷

The position of the United States both as regards the regular interpretation and that for extraordinary cases was thoroughly set forth in the diplomatic correspondence which followed the making of the treaty with Hawaii, January 30, 1875. In this, a treaty of strict reciprocity and unusual favors, it was stipulated that, in consideration of very material advantages in return, each country

³⁶ Cf. Mr. Fish's refusal to make a treaty with Argentine for a fixed scale of duties, 1869, Moore, *op. cit.*, V, 262; the action of the United States when unexpected consequences followed the making of the treaty with Belgium (*Ib.* 262).

³⁷ Moore, *op. cit.*, V, 285.

would admit certain articles from the other, duty free (articles I and II), and that no other nation should have the same privilege in Hawaii as the United States, nor would Hawaii make treaties with any giving them such (article IV). The English government protested.³⁸ England had an agreement with Hawaii (Treaty, July 10, 1851), that neither country would charge higher duties upon articles from the other than upon the same articles from any third nation. It has been usual for United States diplomats, to say that, as between two states which have a most-favored-nation treaty, each may demand and secure favors given by the other to a third, providing it, the second, will grant to the first concessions equivalent to those granted by the third.³⁹ But under the provisions of this treaty, Hawaii was unable to extend even this right to England, so it appears that in order for her to keep her treaty obligations with the United States it was necessary for her to break her promise to England and to establish an effective discrimination against English and other goods. From this fact it might seem that M. Visser's suggestion, that the action of the United States in this case was not in agreement with the doctrine which it maintains, is correct. But the case was an exceptional one. Not only did the United States hold that "the concession of these privileges to the United States can not form the basis for a claim to like privileges under the parity clause of the ordinary form of treaty, as such special privileges were given in return for special valuable considerations," but it considered this as, for geographical and political reasons, a special and extraordinary case. This view was certainly justified, and it was soon so recognized by Great Britain. In the arrangements between Hawaii and Germany, 1878, it was specified that the special advantages granted to the United States should not be invoked as a precedent for treatment of Germany.⁴⁰ The Hawaiian case was held exceptional in a very clearly worded

³⁸ Sweden, Belgium, and Holland also protested under treaties of July 1, 1852, Oct. 4, 1862, and Oct. 16, 1862, respectively.

³⁹ Cf. Mr. Freylinghuysen's note to Mr. Bingham, Minister to Japan, June 11, 1884, Moore, *op. cit.*, V, 267-268. Cf. Herod, *op. cit.*, 113-114.

⁴⁰ See Foreign Relations U. S., 1878, 382-383, 403, 405.

decision in the United States Supreme Court, in 1887.⁴¹ In this case brought by Denmark, relying upon the most-favored-nation clause in her treaty of April 26, 1826, the Supreme Court held:

These stipulations * * * do not cover concessions like these made to the Hawaiian Islands for valuable considerations. They were pledges * * * that there should be no discrimination * * * in favor of goods of like character imported from other countries. * * * They were not intended to interfere with special arrangements with other countries founded upon a concession or special privileges.⁴²

In this connection it is interesting to turn to the treaty between the United States and Tonga, Oct. 2, 1886. In article II, after stipulating for most-favored-nation treatment, appears the following clause:

it being understood that the Parties hereto affirm the principle of the law of nations that no privilege granted for an equivalent or on account of propinquity or other special considerations comes under the stipulations herein contained as to the most-favored-nations.

This was doubtless inserted on account of the claims of England under the Hawaiian treaty.⁴³

The following case suggests a decided inconsistency on the part of the United States. In the treaty between United States and Prussia, 1828, referred to above, article 5 reads: "No higher or other duties shall be imposed on the importation into" either of any article the produce or manufacture of the other "than are or shall be payable on the like article being the produce or manufacture of any other foreign country * * * ." Article 9 reads: "If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted * * * or on yielding the same compensation, when the grant is conditional." To Germany's contention — in agreement with her own as well as the general diplomatic practice of Europe, — that article 5 is the regulating factor, the United States has repeatedly

⁴¹ *Bartram v. Robertson*, 1887, 122 U. S. 116.

⁴² See also U. S. Foreign Relations, 1881, 622 ff.; and Herod, *op. cit.*, 116 ff.

⁴³ Snow: American Diplomacy. 176. Contrast with this the treaty between Great Britain and Tonga, Nov. 29, 1879, art. 2.

answered that the conditions of article 9 have a modifying effect on article 5 and that only in return for an equivalent can concessions granted a third nation on a reciprocal basis be granted to the second. Now in a treaty between the United States and Hayti, November 3, 1864, article 2 provided that favors in commerce and navigation which either had granted or should grant to a third party should extend "in identity of cases and circumstances" to the other; "gratuitously if * * * gratuitous; or * * * for compensation if * * * conditional." Article 10 provided: "* * * no higher or other duties upon the tonnage or cargo of the vessels" of one shall be levied in the ports of the other than are levied or collected on the vessels of the most-favored-nation. July 31, 1900, Hayti made a treaty with France which was evidently reciprocal in its nature, France granting Hayti certain privileges in return for which Hayti reduced the tonnage dues paid by French sailing vessels and the dues on merchandise landed from them, if of French origin. The United States government at once demanded the same rights for American vessels under article 10 of the treaty of 1864. The Haytian government invoked the application of article 2. The United States government answered that "Article 10 is quite independent of article 2, and creates absolute rights which this government can not fail to insist upon." The correspondence on the subject indicates that the American foreign office was very much out of patience with Hayti, and their communications, unfortunately, do not indicate the line of argument by which they maintain this position.⁴⁴ Unless some special significance can be attached to the phrase "in identity of cases and circumstances" in article 2, or unless the United States can point out some particular circumstance whereby the grant made by Hayti to France is "freely made" rather than a return for compensation, it is difficult to arrive at any other conclusion than that this forms an arbitrary exception to the practice of the United States.

Another case in which the action of the United States appears open to criticism is that of the treatment accorded to Colombia under the Act of October 1, 1890. This Act admitted certain articles

⁴⁴ U. S. Foreign Relations, 1901, 278-279.

to the United States duty free, but allowed the President, if he considered the duties of any country reciprocally unequal, to suspend the free list upon goods of such country. After the failure of attempts to negotiate a reciprocity treaty with Colombia, the President, March 15, 1892, suspended the free list on certain products of Colombia. At the same time similar goods of Mexico and Argentine were gratuitously enjoying these favors. Colombia, relying upon her favored-nation clause, protested. To the insistent and fiery notes of the Colombian Minister, the United States Foreign Office replied in a lengthy correspondence which contains excellent suggestions as to diplomatic "good-form," but fails apparently to answer the logic of the Colombians or to analyze to any extent the justice of their demands.

At the same time, the practice of other nations presents isolated instances of inconsistencies, though in no case are these sufficient to disestablish the regularity of their interpretations. In Germany in 1885, under the guidance of Bismarck, who asserted that the relations of Germany and the United States were on the basis of the most-favored-nation, the Bundesrat, in an ordinance granting to the most-favored-nations the lower duties granted to imports of rye from Spain, expressly included the United States; but in 1883, in a similar ordinance extending to most-favored-nations certain concessions recently granted to Spain and Italy, the United States had not been included. In 1891, Germany negotiated a series of treaties with European countries for reciprocal reductions of import duties. To be consistent with the principle advocated in 1885, they should have extended the reduced duties granted to various European countries to the United States. This they did not do. The Saratoga Convention of August 22, 1891, was based on reciprocity and was, in character, a bargain in return for concessions.⁴⁵

Certain inconsistencies in English practice will be treated under the subject of countervailing duties.

Among modern European treaties which contain the clause, none is more often quoted than the Frankfort treaty between Germany and France, May 10, 1871. In it we find (article 11):

⁴⁵ See Stone: Most-favored-nation relations between Germany and the United States, *N. Am. Rev.*, 182 (1906), pp. 433-445.

The French and German governments will base their commercial relations upon the system of reciprocal treatment on the footing of the most-favored-nation. * * * This rule shall apply * * * to favors which either has granted or shall grant to States other than the following: England, Belgium, Holland, Switzerland, Austria and Russia * * *

It is claimed that the operation of this treaty has always been to give to each contracting party every advantage which was or has been granted by the other to a third nation (with the exception of the States mentioned).⁴⁶

The Treaty of Commerce between Germany and Austria-Hungary, December 6, 1891, amended January 25, 1905, provides that no more favorable conditions in respect of "importation, exportation, and transit duties" shall be granted by either party to a third power than shall be accorded to the other party; that any concessions of this kind shall at once apply to the other; and that any disputes arising over this provision shall be submitted to arbitration.

Two treaties of special interest on account of their comprehensiveness are the following:

The treaty between Greece and Japan, May 20-June 1, 1899, stipulates for reciprocal most-favored-nation treatment as regards, (article II) diplomatic and consular officers, (article III) commerce, navigation, residence, hiring residences and warehouses, trading, all that concerns the acquisition, enjoyment and disposition of property of all kinds, (article IV) travel, commerce, navigation, (article V) export and import duties and prohibitions, transit, warehousing, bounties, drawbacks, (article VII) tonnage, light and harbor dues, pilotage, quarantine, salvage in case of damages, (article XIII) billeting, compulsory military service, contributions of war, military exactions, and forced loans. The coasting-trade is excepted (article VIII).

The treaty between China and Mexico, December 14, 1899, while a little less complete than the above, is nearly as comprehensive and includes also (article IX) ships of war; it also provides (article XI) that if either country shall open its coasting trade, wholly or

⁴⁶ Visser, *op. cit.*, 83-84.

in part, to any nation or nations, the other party shall have the right to claim the same concessions or favors, "provided said contracting party is willing, on its part, to grant reciprocity in all its claims on this point." There is also a provision that the treaty shall remain in force ten years.⁴⁷

Several modern treaties specify that citizens of each nation in the dominion of the other shall enjoy absolute religious freedom and the same legal privileges as native subjects.

An excellent example of the imperative and unconditional form appears in the treaty between Germany and Russia, January 29, 1894, July 15, 1904, article 6:

The products of the soil and industry of [each, when imported into the other] destined for consumption, warehouse, re-exporting, or transit, will be treated in the same manner as the products of the most favored nation. In no case, and on no account will they be liable to duties, charges, taxes, or dues higher or other, nor be subjected to surtaxes or to exclusion from importation by which the similar products of any other country are not affected. *Especially any favor and facility, any immunity, and any reduction of the customs dues contained in the German tariff or in the treaty tariffs which one of the contracting parties may give to a third power permanently or temporarily, gratuitously or for compensation, will immediately and without conditions, reservations, or compensation be extended to the products of the soil and industry of the other.*

England has been as consistent in maintaining that the clause is absolute as the United States that it is not. In 1884, Mr. Freylinghuysen said of the English position: "The English contention has hitherto been, under the most-favored-nation clause, * * * that it is absolute, and that even when Japan may bargain with any power to give it a favor for an equivalent the favor must be granted to England without equivalent. The Japanese contention is the reverse of this * * *" *i. e.*, in agreement with that of the United States.⁴⁸ In 1885, Earl Granville wrote:

From this [the American] interpretation, Her Majesty's government entirely and emphatically dissent. The most-favored-nation clause has now become the most valuable part of the system of commercial treaties,

⁴⁷ Cf. also treaty between United States and Japan, November 22, 1894.

⁴⁸ Mr. Freylinghuysen to Mr. Bingham, June 11, 1884, MS. Inst. Japan, III, 1253, Moore, *op. cit.*, V, 267.

and exists between almost all the nations of the earth. It leads more than any other stipulation to simplicity of tariffs and to ever-increased freedom of trade; while the system now proposed would lead countries to seek exclusive markets and would thus fetter instead of liberating trade. It is moreover obvious that the interpretation now put forward [just that which the United States has *always* put forward] would nullify the most-favored-nation clause; for any country, say France, though bound by the most-favored-nation clause in her treaty with Belgium, might make treaties with any other country involving reductions of duties on both sides, and, by merely inserting the statement that these were granted reciprocally and for a consideration, might yet refuse to grant them to Belgium unless the latter granted what France might consider an equivalent. Such a system would press most hardly on those nations which have already reformed their tariffs and have not equivalent concessions to offer, and therefore Great Britain, which has reformed her tariff, is most deeply interested in resisting it.⁴⁹

This last sentence contains within the compass of its few words the key to the English position and the explanation of the English interpretation.

The English treaties have been true to these principles, but not without exception. In the treaty with Liberia of November 21, 1848, we find the following stipulation (article 7):

It is hereby agreed between them that any favor, privilege, or immunity whatever, in matters of commerce and navigation which either * * * has actually granted, or may hereafter grant, to the subjects or citizens of any other State, shall be extended to the subjects or citizens of the other * * * gratuitously, if the concession in favor of that other state shall have been gratuitous, or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.

English treaties have been, however, as a rule, both in wording and in interpretation, unmodified. The purport of their most-favored-nation provision is in general, that "in all matters and regulations of trade and navigation, each of the high contracting parties will treat the other upon the footing of the most-favored-nation."⁵⁰

⁴⁹ Earl Granville to Mr. West, Feb. 12, 1885, Blue Book, Commercial, No. 4 (1885), 21-22, Moore, *op. cit.*, V, 270-271.

⁵⁰ Treaty between Great Britain and Sweden and Norway, March 18, 1826, art. 9. In the treaty between England and France, Jan. 26, 1826, art. 4

A favorite form of the clause in English treaties, found constantly recurring, often in identical form, sometimes with slight variations of wording, is the following: "The contracting parties agree that, in all matters relating to commerce and navigation, any privilege, favor, or immunity whatever, which either * * * has *actually* granted or may hereafter grant to the subjects or citizens of any other state shall be extended immediately and unconditionally to the subjects or citizens of the other contracting party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most-favored nation."⁵¹ Another form found repeatedly in English treaties in common with those of other nations reads: "No higher or other duties," or "no higher or other import * * * or export duties" shall be paid on the goods of one country in the territories of the other than are payable on like goods of other countries.

Earlier British treaties simply stipulated for "reciprocal liberty of commerce,"⁵² or "reciprocal freedom of commerce."⁵³

A review of the circumstances which have attended the regular occurrence of the clause in modern English treaties⁵⁴ furnishes an object lesson in both the advantages and disadvantages which attend its use. Its extensive and emphasized employment, with a very

provides: "It is mutually agreed between the high contracting parties that, in the intercourse of navigation between their two countries, the vessels of any third power shall in no case obtain more favorable conditions than those stipulated in the present convention in favor of British and French vessels."

⁵¹ Treaty between Great Britain and Paraguay, Oct. 16, 1834, art. 2. *Cf.* also treaties of Great Britain with Honduras, Jan. 21, 1887; France, Feb. 28, 1882; Mexico, Nov. 27, 1888; Japan, July 16, 1894.

⁵² Treaty between United States and Great Britain, July 3, 1815, art. 1.

⁵³ Great Britain and Venezuela, April 18, 1825, art. II; and Great Britain and Russia, Jan. 12, 1859, art. I. In the convention between Great Britain and the United States, March 2, 1899, and Jan. 13, 1902, art. 5, appears the following: "In all that concerns the right of disposing of every kind of property, real and personal, citizens or subjects of each * * * shall in the dominions of the other enjoy the rights which are or may be accorded to the subjects or citizens of the most-favored nation."

⁵⁴ In 1903 no less than forty-two English treaties with foreign powers contained most-favored-nation clauses. *Cf.* Parl. Pap. Commercial No. 9. (1903).

definite and determined object became one of the leading features of English commercial politics after the making of the Cobden treaty (1860). As the practical champion of commercial liberalism, and as the advocate of universal free trade, England found the most-favored-nation clause a necessary and invaluable instrument. It soon became evident that although the English were enjoying all the benefits which France extended to the trade and commerce of every other nation, yet the balance of advantages under that treaty was in favor of France. The influence of the new conditions upon British policy is apparent in the treaties which followed with Belgium July 23, 1863, with Italy Aug. 6, 1863, and with Prussia and the Customs Union May 30, 1865.⁵⁵ In the last-named treaty, England acquired a position more favored than that of France, in that most-favored-nation treatment was extended to the British colonies and all other English possessions. Between 1860 and 1866, England made other most-favored-nation treaties with Nicaragua, Turkey, Belgium, San Salvador, and Colombia. After the change occasioned in Anglo-French commercial relations by the temporary change in French policy, in 1872, a new treaty was made between the two nations, July 23, 1873. Treaties were also made with the Bey of Tunis, July 19, 1875, and with Austria, November 26, 1877. In these treaties the English invariably insisted upon the insertion of the most-favored-nation clause.⁵⁶

The convention made between England and France, February 28, 1882, guaranteed to "goods of English origin or manufacture," with the exception of "colonial produce," most-favored-nation treatment. On May 22, 1882, England made a most-favored-nation treaty with Portugal, the latter receiving the right to concede special advantages to Brazil. The treaty made with Italy, June 15, 1883, was based entirely on most-favored-nation treatment. England also won, against much opposition, a most-favored-nation treaty with Spain, April 26, 1886, in which the expressed advantages were extended to the colonies of both contracting parties. Between 1880 and 1890 other treaties, too, of the same general character were made with Serbia,

⁵⁵ Cavaretta, *op. cit.*, 109-110.

⁵⁶ *Ib.* 113.

Roumania, Ecuador, the Transvaal, Montenegro, the Kongo, Uruguay, Egypt, Mexico, Paraguay, Honduras, and Greece. Thus, in the prosecution of this policy, England achieved many advantages. She was giving very little — for how much could she, with her free trade policy, concede? — and for this little she was getting much.⁵⁷

She had much reason to be flushed with the success of her commercial policy; yet, both free trade and the unlimited interpretation of the most-favored-nation clause were destined to cause England no little inconvenience.

The reaction from the growing sentiments of free trade toward protection, which began with the revolt of Germany, and soon became strong among European states, gave a new direction and another form to their commercial treaties. Militarism, an emphatic national self-consciousness, and the application of the historical method to economic questions appear among the chief causes which checked the tide of free trade and once more turned Europe toward protection.⁵⁸ The continental nations awoke to a full realization of the difference between England's and their own economic situations. Special tariffs, plus the most-favored-nation clause, became the order of the day. Then there followed a series of treaties of which the most-favored-nation clause alone was the basis. The more recent commercial policies of France, Germany, Portugal and Spain have been referred to above.

In 1884, Lord Granville demanded that the advantages which the United States were extending to Hawaii and some states of South America, especially in regard to the importation of sugar, be extended to the British West Indies. This demand was based on the most-favored-nation clause (article II) in the treaty between the United States and Great Britain of July 3, 1815.⁵⁹ The United States answered that the clause should not and could not be interpreted extensively.

⁵⁷ *Cf.* Smart: *The Return to Protection*, 130.

⁵⁸ *Cf.* Cunningham: *The Free Trade Movement*, 84 ff.

⁵⁹ "No higher or other duties * * * on the imports or exports of any articles the growth, produce, or manufacture of the territories of one * * * into one from the other * * * than payable on the like articles * * * of any other foreign country."

With the rise of sugar-bounties question, England found her attitude concerning countervailing duties inconsistent with her interpretation of the most-favored-nation clause. This question caused considerable agitation in England and in several of the colonies, and it was even urged that the government be given freedom to use, when circumstances warranted, some of the instruments of protection. The preferential tariff movement led to a propaganda in the British colonies, especially in Canada, against the clause of the most-favored-nation. This agitation soon centered in the Imperial Federation League. The chief grievance against the clause arose from the fact that it prevented the colonists from conceding special advantages which they desired to their trade with the mother country. The clause operated so as to extend at once such favors as were granted to the latter to other nations. The operation of the clause appears to have extended also to trade between the colonies and thus to have been altogether an obstacle to preferential treatment. In 1890 the Canadians made a strenuous attack upon the clause and voted that it be not inserted in future treaties. The Canadians regarded it as all-important to their trade that this obstacle be removed, and they presented memorials to that effect to the crown in 1893. The Imperial Government in its reply emphasized the importance of the clause in maintaining British commercial independence. Recognizing its failure in the attempt to convert the world to the principles of free trade, the English government regarded the most-favored-nation clause as an instrument by means of which they could "so to speak, enjoy indirectly the benefits and advantages enjoyed by other states."⁶⁰

The Canadians drew up a law in 1897, of which article 17 read,

When the customs tariff of any country admits the products of Canada on terms which on the whole are as favorable to Canada as the terms of the reciprocal tariff referred to are to the countries to which it may apply, articles which are the growth, produce or manufacture of such country, when imported directly therefrom, may then be entered for duty or taken out of warehouse for consumption in Canada at the reduced rates of duty provided in the reciprocal tariff set for them in schedule D.

⁶⁰ Cavaretta, *op. cit.*, 125.

It was urged against this law that it conflicted with the English treaties of commerce with Belgium, July 23, 1862, and with Germany, May 30, 1865, which provided that the products of those countries should not be subjected in English colonies to higher duties than the produce of the United Kingdom or any other country of like kind. The Canadian government argued, relying upon the American example, that there would be no unequal treatment, because Belgium and Germany could obtain the same treatment as England upon satisfying the same conditions.⁶¹ In view of the wording of the English treaties, and of the policy of England with regard to these treaties, this argument seems unsupportable, as neither coincides with, and therefore neither can depend upon, the principles upon which the United States practice is based. The two treaties were, however, soon abrogated by the English government, so that the Canadian tariff law might go into effect. Other nations then recognized the contention that arrangements made between England and Canada came under a special class as colonial arrangements, and refrained from demanding similar treatment under the most-favored-nation clauses in their treaties.

The free-trade example of England had failed to bring about the cosmopolitanism which had been the cry of the Cobdenites. Universal free trade was not to be realized with a bound. It may come — as may perhaps universal disarmament — as a result rather than as a cause of cosmopolitanism, but in the meantime the pioneer finds it hard indeed to be consistent, to defend and to maintain her commercial position without using weapons similar to those which her competitors employ.

It is evident, not only from the mass of writing upon the subject, but from the action of the government, that the English are undergoing a change of sentiment as concerns commercial policy, and by no means the least among the indications of this, is the attitude of the English Foreign Office in the first few years of this century toward English obligations under the most-favored-nation clause.

(The remainder of Mr. Hornbeck's article, dealing with interpretation, will appear in the next issue of the JOURNAL.)

⁶¹ Cf. Visser, *op. cit.*, 279.

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ELIHU ROOT

It would be unbecoming in the JOURNAL as the organ of the American Society of International Law, of which Mr. Root is the first and only president, to eulogize his services as secretary of state. It is, however, the sober truth to state that his tenure of office from July, 1905, to January 27, 1909, marks a distinct era in American diplomacy, and that the foreign relations of the United States have in no single period, if indeed ever before, been regulated in accordance with the dictates of an equal and impartial justice, irrespective of race or nationality, political geography, or form of government. Great as are his actual achievements as secretary of state, the spirit which animated him and which he has infused into the foreign policy of the United States is still greater, of which the essence is a desire to decide the

problem justly, whether the solution be advantageous or not to the United States, to consider the controversy not as an advocate or partisan but as a judge doing equity rather than administering law, and by removing the controversy between nations, to dissipate ill feeling and jealousy, to minimize friction, and to establish confidence and friendship, based upon a correct understanding and appreciation of the motives and purposes of the contending parties. "The rule of law is to supersede the rule of man."¹

The spirit which has guided him in the administration of his great office, was set forth and illustrated by Mr. Root on three great occasions: first, in his various addresses delivered in his South American trip in 1906; second, in his address on laying the cornerstone of the new building for the International Bureau of the American Republics in Washington, May 11, 1908; and finally, on February 26, 1909, in an address of great power, beauty and feeling, at the dinner given to him by the American Peace Society of New York.

As honorary president of the Third Conference of American Republics held at Rio de Janeiro on July 31, 1906, Mr. Root said:

No nation can live unto itself alone and continue to live. Each nation's growth is a part of the development of the race. There may be leaders and there may be laggards, but no nation can long continue very far in advance of the general progress of mankind, and no nation that is not doomed to extinction can remain very far behind. It is with nations as it is with individual men; intercourse, association, correction of egotism by the influence of other's judgment, broadening of views by the experience and thought of equals, acceptance of the moral standards of a community the desire for whose good opinion lends a sanction to the rules of right conduct—these are the conditions of growth in civilization. A people whose minds are not open to the lessons of the world's progress, whose spirits are not stirred by the aspirations and the achievements of humanity struggling the world over for liberty and justice, must be left behind by civilization in its steady and beneficent advance.²

And in speaking of the just ambition of his country, he said in the same remarkable address:

We wish for no victories but those of peace; for no territory except our own; for no sovereignty except the sovereignty over ourselves. We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire, and we deem the observance of that respect the chief guaranty of the weak against the oppression

¹ Secretary Root's "Speeches in South America," 1906, p. 9.

² *Id.*, p. 12.

of the strong. We neither claim nor desire any rights, or privileges, or powers that we do not freely concede to every American Republic. We wish to increase our prosperity, to expand our trade, to grow in wealth, in wisdom, and in spirit, but our conception of the true way to accomplish this is not to pull down others and profit by their ruin, but to help all friends to a common prosperity and a common growth, that we may all become greater and stronger together.¹

In the address at the laying of the cornerstone of the new building for the International Bureau of the American Republics, Mr. Root said:

Many noble and beautiful public buildings record the achievements and illustrate the impulses of modern civilization. Temples of religion, of patriotism, of learning, of art, of justice, abound; but this structure will stand alone, the first of its kind — a temple dedicated to international friendship. It will be devoted to the diffusion of that international knowledge which dispels national prejudice and liberalizes national judgment. Here will be fostered the growth of that sympathy born of similarity in good impulses and noble purposes, which draws men of different races and countries together into a community of nations, and counteracts the tendency of selfish instincts to array nations against each other as enemies. From this source shall spring mutual helpfulness between all the American republics, so that the best knowledge and experience and courage and hope of every republic shall lend moral power to sustain and strengthen every other in its struggle to work out its problems and to advance the standard of liberty and peace with justice within itself, so that no people in all of these continents, however oppressed and discouraged, however impoverished and torn by disorder, shall fail to feel that they are not alone in the world, or shall fail to see that for them a better day may dawn, as for others the sun has already risen.

It is too much to expect that there will not be controversies between American nations, to whose desire for harmony we now bear witness; but to every controversy will apply the truth that there are no international controversies so serious that they cannot be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they cannot be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything.

And finally, in New York, at the banquet in commemoration of his services to the cause of peace, he said:

It seems to me that the Peace Society in asking me to dine with them has gathered here all the evidences, all the proofs, the demonstration of what it is worth to preserve — peace; the faces of my old home, the dear old friends of a lifetime, the children of many a friend who has passed away during my absence from New York, all this that I see about me, is what makes it worth while that peace shall

¹ *Id.*, p. 12.

be defended and continued by this modern civilization which substitutes peace for war. We have passed in the development of modern society far from those old days when men fought for the mere joy of fighting; except here and there an individual and here and there a half-savage community, no one now makes war for the love of war. But there are causes of war, and I am going to take the occasion of having you here to suggest some missionary work in the interests of the society which is giving this dinner, and which, it seems to me, my friends have invaded and overwhelmed.

The work of a peace society and the work of peace-loving men and women, the work of all those who love home, who desire that mankind shall be enlarged in intelligence and in moral vision, of all those who desire to see science and art and the graces of life and sweet charity and the love of mankind for one another continue and grow among men, their work is to aid, not by great demonstration, but by that quiet, that resistless influence which among great bodies of men makes up the tendency of mankind and in the long process of the years moves men from savagery and brutality to peace and brotherhood. It rests with the army and the navy to make aggression and injustice unprofitable and unattractive. It rests with you and with me, with every woman without struggling for the right of suffrage, to exercise the powers that God has already placed in our hands, of every man in the exercise of his duties, political and social, to morally move the conceptions of an honorable life away from the old ideas of savagery toward the new ideas of civilization, of humanity, that in their progress gradually approximate to the supreme idea of Christianity.

Peace can never be except as it is founded upon justice. And it rests with us in our own country to see to it that the idea of justice prevails and prevails against the declamation of the demagogue, against the interested exhortation of the politician, against the hot temper of the foolish and of the inconsiderate. If we would have peace it isn't enough to cry "Peace! Peace!" It is essential that we should promote and insist upon the willingness of our country to do justice to all countries of the earth.

In the exercise of those duties in which the ambassadors of Great Britain, of Brazil and of Japan have displayed so great a part in the last few years in Washington the great obstacle to the doing of things which make for peace has been not the wish of the diplomatist, not the policy of the government, but it has been the inconsiderate and thoughtless unwillingness of the great body of the people of the respective countries to stand behind the man who was willing for the sake of peace and justice to make fair concessions.

There is a peculiar situation created when a diplomatic question arises between two countries. It is the duty of the diplomatic representatives to argue each the cause of his own country; he cannot turn his back upon an opponent in that friendly contest and state to his countrymen the weakness of his own position and the strength of the other side's position, and it is one of the great difficulties of peace making and peace keeping that the orators, the politicians, the stump speakers, aye, often, the clergymen of each country, press and insist upon the extreme view of their own country, and impress upon the minds of the great masses of people who have not studied the question the idea that all right is upon one side and all wrong upon the other side.

If you would help to make and keep peace, stand behind the men who are in the responsible positions of government, ready to recognize the fact that there is some right on the other side.

War comes to-day as the result either of actual or threatened wrong by one country to another, or as the result of a suspicion by one country that another intends to do it wrong, and upon that suspicion, instinct leads the country that suspects the attack to attack first; or from bitterness of feeling, dependent in no degree whatever upon substantial questions of difference, and that bitterness of feeling leads to the suspicion, and the suspicion in the minds of those who suspect and who entertain the bitter feeling is justification for war. It is their justification to themselves.

The least of these three causes of war is actual injustice. There are to-day acts of injustice being perpetrated by one country upon another; there are several situations in the world to-day where there is gross injustice being done. I will not mention them, because it would do more harm than it would good, but they are few enough. By far the greatest cause of war is that suspicion of injustice, threatened and intended, which comes from exasperated feeling.

Now, the feeling which makes a nation willing to go to war with another makes real causes of difference of no consequence. If the people of two countries want to fight they will find an excuse, a pretext, find what seems to them sufficient cause in anything. Questions which can be disposed of without the slightest difficulty between countries really friendly are insoluble between countries really unfriendly. And the feeling between the peoples of different countries is the product of the acts and the words of the peoples of the countries themselves, not of their governments. Insult, contemptuous treatment, bad manners, arrogant and provincial assertion of superiority is the chief cause of war to-day.

And in this country of ours we are far from free from being guilty of all those great causes of war. The gentlemen who introduced into the legislatures of California, Montana and Nevada the legislation regarding the treatment of the Japanese in those states doubtless had no conception of the fact that they were doing to that great nation of gentlemen, of soldiers, of scholars and scientists, of statesmen, a nation worthy of challenging and receiving the respect, the honor and the homage of mankind, an injury by an insult that would bring on private war in any private relation in our own country.

Thank Heaven the wiser heads and the sounder hearts, instructed and enlightened upon the true nature of the proceeding, prevailed and overcame the inconsiderate and foolish. There are no two men in this room to-night who cannot bring on private war between themselves by an insult without any cause or reason, and it is so with the nations, for national pride, national sensitiveness, sense of national honor, are more keenly alive to insult than can be the case with any individual.

But a few days ago a member of the House of Representatives, with no other apparent purpose than to make himself prominent by an attack upon an American, charged upon the Chief Magistrate of the little Republic of Panama a fraudulent conspiracy with regard to a contract under negotiation by the government of that country regarding the forests of Panama.

All Panama was instantly alive with just indignation. This insult was felt all the more keenly because we, with our ninety millions and our great navy and

army, presented an overwhelming and irresistible force with a little republic whose sovereignty we are bound, trebly bound, in honor to maintain and respect.

These are the things that make for war, and if you would make for peace you will frown upon them, condemn them, ostracize and punish by all social penalties the men who are guilty of them until it is understood and felt that an insult to a friendly foreign power is a disgrace to the insulter, upon a level with the crimes that we denounce and for which we inflict disgraceful punishment by law.

Two-thirds of the suspicion, the dislike, the distrust, with which our country was regarded by the people of South America, was the result of the arrogant and contemptuous bearing of Americans, of people of the United States, for those gentle, polite, sensitive, imaginative, delightful people.

Mr. Choate has alluded to my visit there, to the generous, magnanimous, hospitality that they have inherited from their ancestors of Spain and Portugal, to the way they opened wide the gateways of their land and their hearts to a message of courtesy and kindly consideration. No questions existed before to be settled, no serious questions have been settled, but the difference between the feeling, the attitude, of the people of Latin America and our Republic to-day from what it was four years ago is the result of the conspicuous substitution of the treatment that one gentleman owes to another for the treatment that one blackguard pays to another.

Now this is the subject for you to deal with. The government cannot reach it. Laws cannot control it; public opinion, public sentiment must deal with it, and when the public opinion has risen to that height all over the world that the peoples of every country treat the peoples of every other country with that human kindness that binds home communities together you will see an end of war. And not until then.

But, my friends, it becomes less and less necessary to preach peace. We have not reached ideal perfection yet, far from it, but the way to judge of conditions in this world is not by comparing them with the standard of ideal perfection; it is by comparing the conditions to-day with the conditions of the past and noting, not what we can do to-day — if we note that alone we must be discouraged; if we note that alone we must be convinced of the desperate selfishness, the injustice, the cruelty of mankind — but if we compare the conditions of to-day with the conditions of yesterday and the last decade and the last generation and the last century and centuries before, no one can fail to see that in all those qualities of the human heart which make the difference between cruel and brutal war and kindly peace the civilized world is steadily and surely advancing day by day.

No one can fail to see that the continuous and unswerving tendency of human development is toward peace and the love of mankind.

My friends, if all men could feel toward each other as I feel toward you to-night the Peace Society might well disband.

It is to be hoped that the addresses of Mr. Root delivered on public occasions may be collected so that the public may have within the compass of a single volume Mr. Root's contributions to the spirit of American diplomacy.

INTERNATIONAL LAW AT THE FIRST PAN-AMERICAN SCIENTIFIC CONGRESS

At the sessions of the First Pan-American Scientific Congress, which were held at Santiago, Chile, from December 25, 1908, to January 5, 1909, the subject of international law received a great amount of attention. The discussion of international law problems was participated in by many noted specialists and excited great public interest, which centered especially around the problem proposed by Señor Alexandro Alvarez¹ as to whether there can be said to exist a special American international law. Señor Alvarez, the Councillor of the Chilian Foreign Office, and Professor Sa Viana, of Rio de Janeiro, presented papers on this subject. On the basis of these papers and the discussions thereof, the section of the Congress adopted the following resolution which was later sanctioned by the Congress itself:

The First Pan-American Scientific Congress recognizes that in the New World there exist problems *suo generis* and of a character completely American; and that the states of this hemisphere have regulated by means of more or less general treaties, matters which interest only themselves or which, though of a universal interest, have as yet not been incorporated in a world-wide convention. In this last case there have been incorporated in international law principles of American origin. The sum of these materials constitutes what may be called American problems and situations in international law. The Congress recommends to all states of this continent that in their faculties of jurisprudence and the social sciences, there shall be given special attention to the study of this subject.

Señor Alvarez, the mover of this resolution, did not desire to propose the establishment of a separate system of international law, but intended merely to point out the fact that on account of the diversity of origin of political institutions, of historical development, and of natural conditions, there exist on the American continent a series of special and characteristic problems which require special attention, and which cannot be solved by a merely imitative study of the established principles of European international law. As in certain matters, America has led the way in the past, so also, in the future, it is desirable that her countries should have a definite American policy in international law naturally flowing out of the special conditions of their political and economic life.

Another subject which aroused discussion was the policy of the most-favored-nation clause. Señor Ernesto Frias of Uruguay read a paper on this subject, in which he favored the abandonment of the most-favored-nation clause for a policy of maximum. minimum, and special

¹ See Mr. Alvarez's article on this subject, *ante*, p. 269.

tariffs. Señor Julio Philippi, of Chile, who also read a paper, did not fully agree with Señor Frias upon the incompatibility of the most-favored-nation clause with the other systems of tariff policy. He acknowledged the inconvenience caused by the uncertainty as to the interpretation of the most-favored-nation clause, and advocated that nations stipulating for the clause should indicate in the same treaty what interpretation was to be followed. As a result of this discussion, the following resolution was voted:

The Pan-American Scientific Congress, in view of the difficulties which have been caused by the interpretation of the most-favored-nation clause, recommends that the bearing of the clause should be defined in each treaty in which it is stipulated. When the most-favored-nation clause is granted, the respective governments should remain free to make special concessions to neighboring countries.

Señor Jose Francisco Urrutia, the Minister of Foreign Affairs of the Republic of Colombia, contributed two papers — one on the "Evolution of the Principle of Arbitration in America," the other on the "Adhesion of American Countries to certain Principles or Treaties of World-wide Character." These papers were read in abstract by General Rafael Uribe Uribe, who also took a leading part in the discussions of the section. Señor Marcial Martinez de Ferrari read a paper on the "Results of the Second Hague Conference," at the conclusion of which he proposed the following resolution:

It is of positive importance, not only for America, but for the world, that the countries of America should be in accord upon the principles which, as far as they are concerned, represent an effective advance in international relations, and which may later receive acceptance in international conferences and specially in the Hague Conference.

Mr. Paul S. Reinsch read a paper on "International Administrative Law in its Relations to the American States," in which he outlined the development of joint action in international unions and the opportunities for usefulness in the Union of American Republics. At the conclusion of the paper, it was voted that

The Congress recognizes the importance of the assistance which governments mutually lend each other in their administrative action, and in order to foment the development of these relations, it declares its readiness to cooperate, within the field of investigation and scientific information, in the work which is carried on by the International Union of American Republics, the Bureau established in Washington, and the Pan-American commissions recently created in the different countries of the continent.

In the field of international politics, Mr. Archibald C. Coolidge read a paper on "America in the Pacific," in which he dealt with the relations of American countries with the Orient. The section met under the presidency of Mr. Leo S. Rowe.

The papers presented contained an abundance of interesting material upon American precedents in international law. The illustrations used by South-American writers would naturally be taken largely from the experience of their own and neighboring nations. In the discussions a truly American spirit prevailed and there was no desire unduly to press the point of view of any particular government. The guiding purpose which had animated the men who prepared the Congress was the essential unity of American science. They considered it desirable that a representative Congress should consider the specific basis and achievements of American science in all its branches. The discussions in the section on international law were in full accord with this purpose. While in no sense favoring a secession from the universal science of international law, the men here assembled attempted to determine the general character and outline of those problems which the American science of international law must solve for itself, either because of conditions in our countries which do not prevail in other continents, or because of the fact that we have come to an accord upon certain principles which as yet have not been made a part of universal international law.

THE RESTORATION OF CUBAN SELF-GOVERNMENT

For the second time within the administration of President Roosevelt Cuba has been evacuated by American forces and turned over to the duly constituted government of the republic. As is well known the war between the United States and Spain was caused by the unsatisfactory condition of Cuba, and the occupation of Cuba by American forces, begun in 1898, was continued until May 20, 1902, when President Palma assumed office. During the summer and fall of 1906 a revolution broke out in Cuba which paralyzed not merely the government but threatened its international position so that the United States felt constrained under the treaty between it and Cuba, dated May 22, 1903, and by virtue of Annex 3 of the Cuban Constitution of May 20, 1902, to intervene "for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with

respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba."¹

In order to ascertain the exact situation in Cuba, the President sent the Honorable William H. Taft, then secretary of war, and the Honorable Robert Bacon, then assistant secretary of state, to Cuba, the former of whom assumed the office of provisional governor of Cuba by proclamation,² proclaimed amnesty,³ issued decree number eleven declaring the congress of Cuba in recess during the provisional government of Cuba,⁴ and on October 13, 1906, turned the provisional government over to Governor Magoon.⁵ Governor Magoon remained in office ably and conscientiously administering the trust reposed in him by the President and the people of Cuba from October 13, 1906, until January 28, 1909, when President Gomez assumed office.

In order that the American occupation and its services to Cuba may be properly estimated a brief résumé is given of the laws drafted and promulgated by the provisional government:⁶

1. *An elaborate Electoral Law*, granting manhood suffrage and framed after the most advanced Australian ballot system, dated December 12, 1907; for the election of municipal and provincial officers on August 1, 1908, and for a general election for President, Vice-President, etc., on November 14, 1908.

2. *An Organic Provincial Law* promulgated May 29, 1908, in force October 1, 1908. Under the law prevailing at the time we assumed the government, the Cuban Congress had legislated generally and the municipalities locally for all land under their jurisdiction. As the whole territory of Cuba was covered by municipal jurisdiction, nothing was left for the provincial authorities to legislate upon or to administer except public works, and the major portion of the provincial revenues collected were expended on personnel, in salaries and expenses.

The limitation of powers of provincial officials is the same under the new law, but it prescribes the portion of the revenue collected which may be spent upon salaries and general expenses.

3. *An Organic Municipal Law*, promulgated May 29, 1908, in effect October 1, 1908, making the municipalities entirely autonomous, without any interference by the general government in their local affairs. No provincial government is needed

¹ For a more extended account of the nature of the second intervention in Cuba see this Journal, 1:149-50.

² Cuban Gazette, September 29, 1906.

³ Id., October 10, 1906.

⁴ Id., October 12, 1906.

⁵ Id., October 13, 1906.

⁶ The facts concerning the legislation passed in Cuba under the provisional government were furnished by Paul Charlton, Esq., law clerk of the Bureau of Insular Affairs, War Department, Washington.

under the system heretofore and now prevailing in Cuba, but the establishment of such government is demanded by Cuban public sentiment, most likely for the reason that it affords places and emoluments to willing patriots.

4. *A Judiciary Law.* The body of the law in force in Cuba consists of enactments originally intended to apply to the Spanish Peninsula, and extended by royal decree or order to Cuba, as the same have been from time to time modified and amended by royal and military orders, and by laws enacted by the Cuban Congress during the Palma administration.

Under this law the supreme judges are to be appointed by the president with the advice and consent of the Cuban senate; all other judicial officers, excepting municipal judges, are to be appointed by the president from ternaries submitted by the Chamber of Administration of the Supreme Court.

Judicial appointments, under the Supreme Court, are originally made for four years. If the judge so appointed is satisfactory, his reappointment follows for a term of six years, and if still satisfactory at the end of said term he is reappointed for life, and is subject to removal only by impeachment.

5. *A Civil Service Law*, modeled on that of the United States, promulgated to take effect at the end of the fiscal year. As all appointive offices will then be filled, and the persons so appointed under the terms of the law pass into the civil service, its effect will not be manifest except in the future.

6. *Law of the Executive Power.* This makes legal provision for the administration of the Executive departments which are: State, Justice, Government, Treasury, Public Works, Public Instruction, Sanitation, Charities, Agriculture, and Commerce and Labor.

The foregoing laws furnish a complete political code for Cuba. Beside them there were promulgated the following laws:

The Law of Armed Forces, providing for a rural guard and permanent army.

Code of Military Justice, providing articles of war.

A Game Law.

In addition there were submitted, and now await the action of the Cuban congress, laws on: drainage and irrigation, telephones, notaries, and mortgages.

Legislation is urgently required on the following questions: Revision of the codes, laws for public instruction, railways, eminent domain, public works, administrative contracts, forestry, mines, and patents.

The foregoing laws were all drafted by an advisory commission appointed by the provisional governor, composed of nine Cubans representing the several political parties, and three Americans, and was headed by Colonel E. H. Crowder, General Staff, U. S. A., as its president.

During the provisional government there was expended on roads, bridges, harbors, light-houses, and other public works \$22,956,659.36, the average yearly budget for the period amounting to about twenty-

three million dollars. Prior to the election in August, 1908, a census of Cuba was taken and completed, under the direction of an official of the United States Census Bureau.

This brief statement sufficiently shows the earnest purpose of the American occupation, for the United States has sought by all means in its power to enable Cuba to maintain that independence acquired for it by the United States. The desires of the American people for the success of the sister republic was admirably voiced by President Roosevelt in his telegram of January 29, 1909, to the president and congress of the republic of Cuba, announcing the termination of the American occupation:

Upon the occasion of this final act, I desire to reiterate to you the sincere friendship and good wishes of the United States, and our most earnest hopes for the stability and success of your government. Our fondest hope is that you may enjoy the blessings of peace, justice, prosperity, and orderly liberty, and that the friendship which has existed between the republic of the United States and the republic of Cuba may continue for all time to come.

THE FIRST DECISION OF THE CENTRAL AMERICAN COURT OF JUSTICE

In its October (1908) issue the JOURNAL called attention to the formation of the Central American Court of Justice, explained its jurisdiction and procedure, and furnished a list of the judges of the court. In July, 1908, Honduras appeared before the court accusing Guatemala and Salvador of unneutral conduct in that the sister republics were taxed with fomenting revolution in Honduras. The pleadings in this remarkable case were set out in sufficient detail in the editorial comment to which reference is made.¹

After considering the case during a period of several months and weighing the arguments addressed to it by the counsel of the parties litigant, the court delivered its judgment on December 19, 1908. The *considerandos* have not been received but will be printed together with the judgment in the section devoted to judicial decisions in a subsequent issue. A literal translation of the text of the judgment follows:

In the city of Cartago, Costa Rica, at 12 at night of December 19, 1908. The deliberations of the court having been considered to have been concluded, so that it could proceed to render judgment on the suit begun by the government of the republic of Honduras against the governments of El Salvador and Guatemala,

¹ Vol. 2, p. 835.

on account of responsibility with which the former government charges the latter two in connection with the revolution which occurred in the former of said republics in July of this year, the honorable presiding magistrate proposed the following set of questions to be answered in rendering the judgment which was to decide the controversy:

1. Should we allow the exception of inadmissibility of the complaint, as interposed by the representative of the Guatemalan government on the alleged ground that said complaint was filed without exhausting the means of settlement between the respective chancelries?

Negative: all five judges.

2. Should we allow the exception, interposed by the same party, alleging insufficiency of the petition to institute proceedings, owing to the circumstance that it was not accompanied by the appropriate evidence when the charge was first preferred?

Negative: all five judges.

3. Is it demonstrated, and should it be so declared, that the government of the republic of El Salvador has violated article 17 of the General Treaty of Peace and Amity concluded at Washington on December 20, 1907, by not arresting and trying the Honduran emigrants who were threatening the peace of their country?

Negative: Judges Gallegos, Bocanegra and Astua.

Affirmative: Judges Ucles and Madriz.

4. Is it demonstrated, and should it be so declared, that the government of the republic of El Salvador violated article 2 of the Additional Convention annexed to said Treaty, by protecting or encouraging the aforesaid insurrectionary movement?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Ucles.

5. Is it demonstrated, and should it be so declared, that the government of the republic of El Salvador contributed toward the accomplishment of said political offense by a culpable lack of diligence?

Negative: Judges Gallegos, Bocanegra and Astua.

Affirmative: Judges Ucles and Madriz.

6. Should, consequently, the action begun against the government of El Salvador be declared proper and the latter therefore sentenced to pay the damages asked?

Negative: Judges Gallegos, Bocanegra and Astua.

Affirmative: Judges Ucles and Madriz.

7. Is it demonstrated, and should it be so declared, that the government of the republic of Guatemala violated article 17 of the General Treaty of Peace and Amity concluded at Washington on December 20, 1907, by not arresting and trying the Honduran emigrants who were threatening the peace of their country?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Judge Ucles.

8. Is it demonstrated, and should it be so declared, that the government of the republic of Guatemala violated article 2 of the Additional Agreement to said treaty by protecting or fomenting the said insurrectionary movement?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Judge Ucles.

9. Is it demonstrated, and should it be so declared, that the government of the republic of Guatemala contributed toward the accomplishment of the said political offense by a culpable lack of diligence?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Judge Ucles.

10. Should, consequently, the action begun against the government of Guatemala be declared proper and the latter therefore sentenced to pay the damages asked?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Judge Ucles.

11. Should the losing party or parties be sentenced to pay the costs of trial?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Judge Ucles answered that the governments of El Salvador and Guatemala should be sentenced to pay the costs.

From the foregoing vote, as stated, it results that judgment is pronounced rejecting the action brought against the high defendants, without sentencing them to payment of the costs.

JOSE ASTUA AGUILAR
SALV. GALLEGOS
ANGEL M. BOCANEGRA

ALBERTO UCLES
JOSE MADRIZ
ERNESTO MARTIN, Sec.

It was not difficult to foresee that the court would take jurisdiction, even although the defendants maintained that diplomatic negotiations, a condition precedent, had not taken place, and it seemed probable that the court would find the allegations of Honduras unsupported by the evidence submitted. The decision marks a great progress toward the judicial settlement of international disputes and shows the complete analogy between public and private law. Whether the judgment of the court is favorably received by Central America or is subjected to criticism the fact remains that the court performed its delicate mission under trying circumstances and that its intervention in the dispute between Honduras on the one hand and Guatemala and Salvador on the other without a request from any of the litigants prevented the outbreak of war in Central America. The action of the court is thus a confirmation of the partisans of arbitration that an international tribunal can not only maintain peace, but in appropriate cases prevent war.

THE VENEZUELAN SITUATION

On June 13, 1908, Secretary Root informed the Venezuelan Government that by reason of the persistent refusal of the existing government of Venezuela to give redress for the governmental action which

substantially destroyed or confiscated all American interests in Venezuela or to submit the claims of American citizens for such redress to arbitration the Government of the United States was forced to the conclusion "that the further presence in Caracas of diplomatic representatives of the United States subserves no useful purpose." Mr. Root therefore directed the American chargé d'affaires to place American interests in the hands of the representative of Brazil, which had already offered its services to the United States. The Venezuelan Government was informed of the decision of the United States, and diplomatic relations between the countries were thereupon severed.

The claims of American citizens referred to by the secretary of state and the refusal of Venezuela to settle them by diplomatic negotiation or to submit them to arbitration, which led to the withdrawal of the American representative, are five in number, namely, (1) claim for the expulsion of A. F. Jaurett; (2) the refusal to arbitrate the claim of the Orinoco Corporation; (3) a refusal to reconsider and to submit to arbitration the claim of the Orinoco Steamship Company, passed upon adversely by the Mixed Commission under the protocol of February 17, 1903; (4) the persistent refusal of Venezuela to redress the wrongs of the New York and Bermudez Company, or to submit the question to impartial arbitration; and (5) finally the unwillingness of Venezuela to adjust the claim of the United States and Venezuela Co., familiarly known as the "Crichfield Claim," or to submit the controversy to arbitration.¹

While it is impossible within the space of an editorial note to set forth these various claims in detail, it is essential to give a brief summary of each of the claims in order to understand the exact nature of the controversy between Venezuela and the United States.

(1) *The Jaurett Claim.* A. F. Jaurett, an American citizen, was notified by the Venezuelan authorities on Saturday evening, November 12, 1904, after the closing hours of business to leave Venezuelan territory within twenty-four hours. A quotation from Mr. Root's despatch, dated February 28, 1907, to Minister Russell sufficiently states the facts and discusses the attitude of the United States.

The reason assigned by the authorities for the expulsion of Mr. Jaurett is that he was notoriously prejudicial to public order. On the following morning—that is to say, Sunday—the prefect of police waited upon Mr. Jaurett and formally

¹ For full details of the claims and the diplomatic correspondence relating to them, see Senate Document No. 413, 60th Congress, first session.

ordered him to withdraw from the territory of Venezuela in twenty-four hours. Although Mr. Jaurett attempted to obtain a modification of the order, so that he might be able to arrange his affairs and although the representative of the government of the United States accompanied and seconded him in this reasonable request, the Venezuelan government refused to grant such permission. Mr. Jaurett was therefore obliged to quit the country on Monday morning in pursuance of the order of the governing authorities of Venezuela, leaving behind him his property, and without being given the opportunity to arrange and set in order his business affairs.

The government of the United States neither questions nor denies the existence of the sovereign right to expel an undesirable resident. It cannot be overlooked, however, that such a right is of a very high nature and that the justification must be great and convincing. Otherwise residence in a foreign country would be neither safe nor profitable, for expulsion might at any moment deprive a resident of the legitimate rewards of a lifetime. While, therefore, the existence of the right is not denied, its exercise must be limited. The act is sufficiently harsh in itself. The manner and method of expulsion should not be humiliating, for it is not the purpose to humiliate and inconvenience the resident expelled, but to save the state from dangers resulting from the residence of the undesirable alien.

It will be observed that the United States did not question the right of Venezuela to expel an undesirable alien, but Mr. Root felt that an American citizen should not be sent out of a country without an opportunity being given him to meet the charges made against him, and to arrange his business affairs. The promulgation of the decree on Saturday, the intervention of Sunday, rendered it impossible for Mr. Jaurett to arrange his affairs. It should be stated furthermore that Mr. Jaurett was domiciled in Venezuela and that article 80, section 22 of the Constitution of Venezuela, by virtue of which the president is authorized to expel foreigners, does not apply to domiciled aliens. Mr. Jaurett's claim is justified, it would seem, not merely by the theory and practice of international law but by a decision of the Venezuelan Commission in 1903, in the case of *Buffalo v. Venezuela*.²

(2) *The Orinoco Corporation Case*. This is a case of the conflict of concessions of the same land, *i. e.*, the Delta of the Orinoco, granted to two people at different times. It appears that one C. C. Fitzgerald was, in 1883-4, was given the concession by the sanction of the Venezuelan Congress. January 1, 1886, the general European minister of Venezuela made an agreement with an American named George Turnbull, whereby the latter was to secure the concession in case the Fitzgerald concession became void through failure of compliance with the

² Ralston's "Venezuelan Arbitration," 1903, pp. 696-706.

term fixed for this purpose. September 9, 1886, the earlier concession was declared non-existent and the Turnbull contract was ratified by the congress. The Manoa Company then became the successor to Fitzgerald's interests and in 1895 asked to be reestablished in his rights, and the President of Venezuela issued a decree in accordance with the Manoa Company's desires. In the fall of the same year the Manoa Company conveyed its entire grant to the Orinoco Company, and in 1901 the government of Venezuela issued a decree stating that all that had been done for the Manoa Company and its successor — the Orinoco Company — since the Turnbull concession, was of no effect and void, and restored the property to Turnbull.

At this juncture, under the protocol of February 17, 1903, the United States and Venezuelan Claims Commission rendered a decision restoring the concession to the Fitzgerald successors — the Orinoco Company, now become the Orinoco Corporation. In addition to the decision of the Claims Commission in its favor, the Orinoco Corporation, in a suit brought against it in a Venezuelan court to test its right to the land, was given a verdict by that court, holding that the first concession being given by authority of congress, could not be revoked by an executive decree, and thereby establishing more firmly than ever the correctness of the claim of the Orinoco Corporation. In 1906, however, despite these decisions, the Venezuelan Government gave four more concessions in the region claimed by the Orinoco Corporation.

In view of this situation the United States requested that the case be submitted again to arbitration, to the Permanent Court of Arbitration at The Hague, to consider and determine:

1. Whether by the wrongful acts of the Venezuelan Government, its officers and agents, the contract rights of the Orinoco Corporation have been destroyed and the value of its concession impaired or destroyed; and

2. Whether injuries have been inflicted upon the Manoa Company (Limited), the Orinoco Company (Limited), and the Orinoco Corporation, or either of them, by wrongful interference with or trespasses upon them while in the partial or entire enjoyment of their contract rights in the Fitzgerald concession; and to award damages accordingly, payable in American gold and bearing interest from the date of the sentence until paid and with power in the tribunal to fix the time and manner of payment of said awards.

(3) *The Claim of the Orinoco Steamship Company.* The Orinoco Shipping and Trading Company (referred to as the "English" company) was organized in London in 1898 and made over all its rights under a concession giving it exclusive use of two mouths of the Orinoco River

for steamship purposes, to the American corporation named the Orinoco Steamship Company. Before this event the English company had acquired the rights of two Venezuelan corporations, the transfer of the franchises of the latter being recognized by the Venezuelan government. In 1900, the Venezuelan government repealed the law closing all mouths but the main one to commerce, thereby destroying the exclusive franchise claimed by the company to the two mouths above noted. The Venezuelan Government was indebted to one of these companies taken over as well as to the English company itself, and compromised those claims by agreeing to pay a certain sum and to extend the franchise of the English company to 1915, six years longer than the original franchise ran, and in 1901 the government repudiated this extension. These two acts severely injured the American company and it turned first to England under the charter of the English company, and then after its assignment to the American company, to the United States for diplomatic aid. An arbitration agreement was finally entered into with Venezuela providing for trial before four commissioners and an umpire. The commissioners disagreed and the umpire, Dr. Barge, was left to decide. Contrary to the terms of the protocol Dr. Barge allowed considerations of a technical nature and the provisions of local legislation to influence his decision, and awarded the complainant company about twenty-eight thousand dollars in place of about one hundred and forty-eight thousand dollars which the company claimed. A reexamination of this decision is now asked by the company, arguing against the claim of Venezuela that the decision of the commission was final, by presenting the fact that the tribunal did not act in accordance with the terms of the protocol which established its jurisdiction.

(4) *The Claim of the New York and Bermudez Company.* In 1883 one H. R. Hamilton obtained from Venezuela a concession or contract for twenty-five years for the exclusive exploitation of asphalt and the uncultivated lands in the state of Bermudez. In addition to the original contract, two additional articles were later agreed upon, and the question as to whether they formed a part of the original contract has caused much dispute, the details of which can not be entered into here. After Hamilton assigned his interest (in 1885) with the approval of the Venezuelan government to the New York and Bermudez Company, the latter company, in order to strengthen its title, secured (in 1888) a right under a mining title to exploit the asphalt lake covered by the concession, for the period of ninety-nine years; and

(also in 1888) secured under a "wild lands title" the fee simple to the land surrounding and covered by the lake. The claim of the company arises out of the repudiation by the Venezuelan government of the Hamilton concession. Under this repudiation based on the ground of non-user, because only the asphalt rights had been taken advantage of, and the right to exploit the surrounding territory had not been availed of, the Venezuelan government prosecuted sequestration proceedings and put in charge a bitter enemy of the company, one A. H. Carner, who worked the mine on a small scale. The company asks to be put in possession again, maintaining that its rights under the two later titles are still good, although the original concession may have expired.

(5) *Claim of the United States and Venezuela Company, or the "Crichfield" Claim.* This claim concerns another of the asphalt concessions. One Guzman in 1900 obtained a concession from acting president Castro, giving him title to an asphalt mine. This concession was sold to G. W. Crichfield, who acted as an agent for an American syndicate, the United States and Venezuela Company. This transfer, as well as the original concession, was validated by the Venezuelan Congress. It was understood that the government would grant Crichfield the right to build a railroad, which was done; and the concession stated that the company should be exempt from taxes except mining dues and stamp fees, should pay no import tax on materials, and should turn the railroad over at the end of fifty years to the Venezuelan government. The railroad was built and the mine started into operation, involving the clearing of rivers and forests, and the employment of 1,000 Venezuelans.

The Venezuelan government has now seen fit to increase the taxation in spite of the clause in the concession saying that future tax laws should not apply to the company. The company has not sought redress in the courts of Venezuela and on that ground Venezuela seeks to evade diplomatic treatment of the claim until the courts have been resorted to. The United States has asserted its position to be that the experience of other claimants, both with the decisions of national and international courts, has been such as to justify the United States in proceeding through diplomatic channels.

The above synopsis shows the status of the various claims at the date when Vice-President Gomez assumed the reins of government after the departure of President Castro. Upon intimation recently conveyed

through the Brazilian government that President Gomez, who as vice-president, was the acting president of Venezuela, and as such was willing to enter into negotiations looking to the settlement of the claims and the reestablishment of diplomatic relations between the two countries, the United States sent the Honorable William I. Buchanan of New York as high commissioner with full powers to negotiate for the settlement of the outstanding difficulties. Mr. Buchanan arrived in Caracas the latter part of December and after weeks of careful, thoughtful, patient discussion succeeded in reaching a settlement upon the cases equally satisfactory it would seem to the honor and dignity of both countries.

Of the five cases it is understood that three were readily settled by Venezuela upon terms satisfactory to both governments. It would seem that Venezuela has admitted the principle contended for in the Jaurett case by the payment to Jaurett of an indemnity for his expulsion. In the Orinoco Steamship Company case Venezuela and the United States agree to submit Barge's decision in the case to arbitration in order that the tribunal of arbitration may determine whether or not the case should be re-arbitrated. Should the tribunal decide that Barge's decision is not properly the subject of re-arbitration, the original decision is to stand. If, on the contrary, the tribunal should decide to reopen the case then the entire case of the Orinoco Steamship Company is to be considered upon its merits and the award of the arbitration tribunal to be final. Both governments agreed to submit the Crichfield case to an arbitration upon its merits. In this latter case there have been no judicial proceedings and Venezuela felt that its submission to arbitration would not in any way question the dignity or validity of national decisions.

The cases of the Orinoco Corporation and the New York and Bermudez Company were more difficult of adjustment because in each of these cases the court of cassation of Venezuela had decided the controversy and Venezuela felt that the submission of these cases upon their merits would necessarily involve disrespect to judgments of its national courts. It was, however, willing to submit the judgment of its courts to arbitration in order to ascertain whether there had been a denial of justice in its judicial proceedings and if the tribunal found a denial of justice then to arbitrate the cases in question upon their merits. The difficulty with this method of procedure was and is that the judgments themselves would have to be submitted to the board of arbitration in order to ascertain whether there had been a denial of justice and it is a mooted question whether the merits of the cases would come before the tribunal in this

form. The United States on the other hand wished to disregard the local decisions and to submit the questions involved in them to arbitration without the embarrassment incident to the examination of the judicial proceedings of Venezuela.

Mr. Root, in presenting this proposition to the government of Venezuela, endeavored to make it clear that it did not involve any sacrifice of dignity, and that a relinquishment of the Venezuelan contention did not involve any sacrifice of honor. He endeavored to make it clear that the United States Government was not coercing. In correspondence with the Venezuelan government he called attention to the fact that the United States has repeatedly submitted to arbitration questions already decided in its own courts, and has confirmed decisions adverse to those of its own courts. The United States and Great Britain have recently agreed to submit to arbitration a number of cases which have been decided by British courts and which are to be examined by arbitration tribunals without regard to the decisions of those courts. The assertion of the finality of decisions of national courts in proceedings against the nation, is, he represented, in its essence a refusal of arbitration. The essential quality of arbitration is the substitution of a tribunal which is international, and therefore unprejudiced, for a tribunal which is national and therefore partial.

Mr. Root submitted to Venezuela a list of cases upon which decisions had been rendered by the Supreme Court of the United States and which questions were afterwards submitted to arbitration by the United States under the British-American Claims Convention, sitting under article XII of the Treaty of Washington. In six of these cases the international tribunal decided adversely to the decision of the Supreme Court of the United States, and its judgment was accepted by this government. In six cases the international tribunal decided in accordance with the decision of the Supreme Court of the United States and Great Britain accepted the judgment without question, which illustrates the general policy of the United States as well as that of Great Britain to freely submit on their merits, to impartial international arbitration, questions involving the decisions of its highest tribunal.

Mr. Root further stated that in a protocol no mention should be made of submitting court decisions to review, but that the protocol should speak of submitting to international decisions cases in respect to which there have already been decisions of the courts. This, he said, will be much easier for Venezuela and is in accordance with the practice of the

great powers. For example, in none of the cases where the United States has submitted cases already decided have the decisions of the courts been treated as being under review, but the cases have been submitted on their merits for a new decision, notwithstanding the previous decisions of the courts. The distinction drawn by Mr. Root between submitting a decision of a court to review and submitting the question involved in the decision of a court, is the distinction between a court of appeal which passes upon a decision, and the arbitration of a question involved in a previous decision. In the first case, by a submission of a judgment to review the sovereignty of the nation is involved, because it creates over and above its courts an international tribunal to which an appeal can be taken from a national to an international tribunal at any time, whereas, in the method proposed by Mr. Root national sovereignty and the finality of national decisions is not involved because the questions are by agreement of the two powers submitted to arbitration on their merits without transmitting the docket from an inferior to a superior jurisdiction.

Venezuela declined to accept Secretary Root's proposition because it believed it against its honor and dignity to submit to international arbitration questions which have already been passed upon by its courts. Venezuela is willing, however, to submit to international arbitration its judicial decisions in order, by examination of such decisions by a court selected from the Hague panel, to determine whether there has or has not been a denial of justice in the proceedings had in the Venezuelan courts. If it shall appear that there has been a denial of justice, then Venezuela will consent that the questions shall be examined upon their merits, and will submit to the final decision of the tribunal. If, on the contrary, a disinterested tribunal, selected from The Hague, shall consider the proceedings so regular that there has been no denial of justice, the decisions of the courts of Venezuela shall be considered as final and the questions in controversy shall be dismissed.

It would seem that the view of Secretary Root is more consistent with national dignity and honor than is the view of Venezuela. Mr. Root regards the judgment of the supreme court of a country as so final and entitled to such credit within the country, that he is unwilling that the judgment as such be submitted to reexamination by any international tribunal.

The case of the Orinoco Corporation is to be submitted to arbitration in such a way that the judicial proceedings had in Venezuelan courts

as well as the legislative and executive acts of Venezuela will be submitted to the tribunal in order to ascertain whether there has been committed in any or all of them manifest injustice. The tribunal is to be composed of three members selected from the permanent panel of the Hague court, one by each nation, and the two arbiters thus chosen are to select from the same court a third. It is wisely provided that none of these arbiters shall be a citizen of the United States or of Venezuela, and no member of the Hague court shall appear as solicitor for either of the two parties to the controversy. Within six months the governments are to send the names of the judges selected by each and within eight months the presentation of the claims must be made. Provision is made in the protocol for direct settlement between the Orinoco Corporation, the United States and Venezuela Company, and the Venezuelan Government, provided such settlement is made within five months and provided further it meets with the approval and gains the consent of the United States government. It is not unlikely that the two cases will be settled out of court. Should negotiations fail there will therefore be three cases submitted to arbitration.

The case of the New York and Bermudez Asphalt Company has been settled directly between the company and the government and no mention of the case is made in the protocol. The private agreement reached between the government and the New York and Bermudez Asphalt Company is set forth in eight articles. In the first and second the company recognizes the annulment of the Hamilton concession, and accepts the sentence of the courts of Venezuela regarding the claim for damages for aiding the rebellion. In the third article Venezuela agrees to reduce the amounts in which the company has been condemned by the aforesaid sentences. As a consequence, the company shall pay to the nation the amount of 300,000 bolivars (about \$60,000) in cancellation of the obligations which the company contracted because of the aforementioned sentences. In Article 4 Venezuela declares that the company possesses over the Guanoco mine a mining title, dated December 7, 1888, as well as title to certain wild lands in which the mine lies. By the terms of Article 5 the government returns to the company the possession and the use of the Guanoco mine and other properties, and concedes to the company free transit and free importation of tools and machinery. The company recognizes the direct domination of Venezuela over the aforesaid mine. In Article 6 the company agrees to sell to Venezuela such Guanoco asphalt as it may need for its public works at a reduction of 25 per cent from

the current price. Article 7 provides that the company shall pay to the national government a tax of 4 bolivars for each ton of asphalt which it may export, without having to pay any other tax; but it is understood that the annual total of this tax shall never be less than the sum of 100,000 bolivars (\$20,000). Article 8 says: "In the aforesaid terms all the questions and differences between the two parties up to to-day are settled, without any rights for subsequent claims in regard to them." In conclusion, both parties to the agreement ask the court immediately to give necessary orders for the sequestered property of the company to be turned over to it.

As the American minister was withdrawn from Venezuela by reason of the failure to consider the various grievances of American citizens, the adjustment of these differences paves the way for resuming the diplomatic relations which were unfortunately suspended. Minister Russell will return to his post, a diplomatic representative will be accredited to the United States, and it is to be hoped that the relations of the two countries will be in future more satisfactory than in the past, because by an interchange of views and an adjustment of difficulties, suspicion has given way to confidence, and both countries are not only willing but desirous to maintain the most cordial relations and good understanding.

A NEW SULTAN IN MOROCCO

The internal commotions in Morocco which led to an assembling of a conference at Algeciras for settling the international status of Morocco, and the adoption of the Algeciras Act¹ of April 7, 1906, the rebellion of Mulai Hafid resulting in the overthrow of the former sultan, and the recognition of the new one, after considerable difficulty and friction between the powers, especially France and Germany, as evidenced by the joint notes of the powers,² the settlement of the controversy between France and Germany arising out of the Casablanca incident,³ have been fortunately terminated, and the agreement between France and Germany concerning the commercial interests of Germany and the political interests of France in Morocco eases the strained international relations caused by the internal disorders of Morocco and re-

¹ See Supplement, 1:47.

² See Supplement, this issue, p. 103.

³ See JOURNAL for January, 1909, p. 176.

moves a source of future trouble between the powers interested in the North African state.

There are two powers preeminently concerned with the future of Morocco, namely, France and Spain. The acquisition of Algeria has made France a neighbor, and it is but natural to suppose that France, either influenced by the position of Algiers and the desire to maintain law and order in the department, or moved by a desire to include Morocco within its sphere of influence should jealously watch the trend of affairs. In the next place the geographical situation of Spain and the foothold which it has in Morocco cause Spain to watch with jealous eyes the progress of events in the neighboring country. An agreement was reached between Great Britain, likewise interested in Morocco, and Spain, dated May 16, 1907;⁴ between France and Spain, dated May 16, 1907;⁵ and between Great Britain and France, dated April 8, 1904.⁶ The agreement between Germany and France (February 9, 1909) the material portion of which follows, likewise recognizes the political interests of France while safe-guarding the commercial relations of Germany:

The Government of the French Republic and the German Imperial Government, actuated by an equal desire to facilitate the execution of the Act of Algeciras, have agreed to define the significance which they attach to its clauses with a view to avoiding any cause of misunderstanding between them in the future.

Consequently, the Government of the French Republic, wholly attached to the maintenance of the integrity and of the independence of the Shereefian Empire, decided to safeguard economic equality there, and accordingly not to impede German commercial and industrial interests, and the German Imperial Government, pursuing only economic interests in Morocco, recognizing at the same time that the special political interests of France are closely bound up in that country with the consolidation of order and of internal peace, and resolved not to impede those interests, declare that they will not prosecute or encourage any measure calculated to create in their favour or in favour of any power whatsoever an economic privilege, and that they will endeavour to associate their nationals in business for which these may be able to obtain contracts (*l'entreprise*).

While this treaty may be distasteful to the element in Germany which wishes the acquisition of foreign naval bases and the political supremacy of Germany in Morocco, the understanding reached by the two powers will be exceedingly gratifying to those who believe that

⁴ See Supplement, 1:425.

⁵ See Supplement, 1:425.

⁶ See Supplement, 1:6.

France and Germany are enemies accidentally, not inherently. A favorite policy of Bismark was to encourage Austria to extend its influence to the south-east thus relieving Germany from the field of Austrian activity. It would seem equally statesmanlike for Germany to encourage France to compensate itself in the Mediterranean far from the Rhine, for the loss of territory consequent upon the unfortunate Franco-German war.

THE BALKAN SITUATION

In an Editorial Comment in the October issue of the *JOURNAL* (1908)¹ it was pointed out that the proclamation of Bulgarian independence on October 5, 1908, that the permanent incorporation of Bosnia and Herzegovina with Austria-Hungary, and the substitution of Greek for Ottoman authority in Crete, constituted a violation of the Berlin treaty of July 13, 1878, which has hitherto formed the basis of law and order in the Balkan peninsula. It was also stated that the annexation of Eastern Roumelia to Bulgaria violated article 13 of the treaty of Berlin, and it was stated that as no one power could change the provisions of a treaty without the consent of the signatories it was probable that the conference of interested powers would meet to consider the situation and recognize formally the changes which had taken place.

A conference has not assembled but the foreign offices of Europe have been busy exchanging notes and views. M. Isvolsky, minister of foreign affairs of Russia, has visited the capitals of Europe and it appears that the difficulties are to be settled by an arrangement satisfactory to the signatories of the treaty of Berlin without a formal conference of the powers.

The two great questions agitating the powers and at times threatening the peace of Europe relate to the compensation to be awarded Turkey for the recognition of Austro-Hungarian sovereignty in Bosnia and Herzegovina, and the conditions upon which the Porte is to recognize the independence of Bulgaria. Without going into the events leading to the Russo-Turkish War it is sufficient to say that the Treaty of Berlin placed the provinces of Bosnia and Herzegovina under Austro-Hungarian occupation and administration. No term was placed to the occupation and administration of the provinces but whatever the

ulterior designs of Austria-Hungary may have been at the conclusion of the treaty of Berlin, the expressions used, namely, "occupation and administration" do not amount to a grant or cession of territory, and however prolonged the occupation or administration may or might be it would nevertheless be, in contemplation of law, temporary. Each succeeding year, however, rendered the evacuation of the provinces less probable, if not more difficult, and reduced Turkish sovereignty to a claim of right. While article 25 of the treaty of Berlin did not subject Novibazar to Austro-Hungarian influence, the article reserved to Austria-Hungary "the right of keeping garrisons and having military and commercial roads in the whole of this part of the ancient vilayet of Bosnia," and that "to this end the governments of Austria-Hungary and Turkey reserved to themselves to come to an understanding on the details." Within a year of the treaty of Berlin Austria-Hungary exercised the reservation and garrisoned Novibazar. Austria-Hungary, evidently, regarded its presence in Novibazar as of a temporary nature for upon proclaiming the annexation of Bosnia and Herzegovina, the dual monarchy withdrew its troops from Novibazar, thus returning it to Turkish control. While this action on the part of Austria-Hungary may have simplified the problem, it did not solve it. The question still remained upon what terms would Turkey recognize the severance of Bosnia and Herzegovina from its temporal domain. After negotiation extending over several months it seems probable that an agreement has been reached between the two countries by the terms of which Austria is to pay Turkey 2,500,000 Turkish pounds, in instalments within a period of two years; that upon payment of the total sum a commercial treaty will come into force and that Austria-Hungary proclaims its protectorate over the Albanian Catholics. With the acceptance of this proposal the Bosnia-Herzegovina difficulty will be settled, at least for the present.

The difficulty with Bulgaria has been at times so acute as to threaten a resort to arms. The situation in Bulgaria has been complicated by the fact that while the treaty of Berlin in its first article constituted Bulgaria an autonomous and tributary principality under the suzerainty of the Sultan, Bulgaria has persistently and continuously claimed and exercised the rights of a sovereign state, and, as is well known, in 1885 annexed Eastern Roumelia which by virtue of article 13 of the Treaty of Berlin was to remain "under the direct political and military authority of his Imperial Majesty the Sultan, under consideration

of political autonomy." By the annexation of Eastern Roumelia, Bulgaria violated the treaty of Berlin, and by its proclamation of independence on October 5, 1908, a still further violation of the treaty was committed. It must be said, however, that the claims of Turkey upon Bulgaria existed in theory, for in fact Bulgaria has for years past been independent. For example, it attended the Second Hague Conference in 1907 as an independent sovereign state on terms of equality with the other members of the conference, presented projects, voted as did the others, and signed the convention in its own name and in its own right.

Theoretically, however, Bulgaria was not independent. According to the conventional law of Europe it was and is, until its independence is recognized, legally dependent upon Turkey. It is not to be supposed, however, that the development of the past thirty years will be checked and that Bulgaria would be subjected even nominally to Turkish control, but it is equally obvious that Turkey would be unwilling to renounce even a theoretical claim of right without compensation. Bulgaria has been willing to purchase the independence it claims and asserts, and Turkey is not unwilling to recognize the actual state of affairs. The difficulty exists in the fact that while Turkey is willing to accept one hundred and twenty-five millions of francs, in full satisfaction of its claims, Bulgaria is willing to pay but eighty-two millions. A dead-lock seemed to have arisen when through the ingenuity of M. Isvolsky, minister of foreign affairs for Russia, a proposal was made which has received the unqualified approbation of Bulgaria as well as of the signatories of the treaty of Berlin.

It appears that Turkey is indebted to Russia by reason of the Russo-Turkish War in the amount of some twenty-two million pounds sterling, payable in seventy annual instalments. Russia agrees to cancel a sufficient number of instalments to enable Turkey to borrow the sum demanded from Bulgaria, namely one hundred and twenty-five millions of francs, and Bulgaria undertakes to reimburse Russia to the extent of eighty-two million francs in the form of an annual payment of about five millions for interest and sinking fund. As the *London Times* in its issue of February 2, 1909, points out, "The arrangement has the further advantage of eliminating financial control of Bulgaria's finances, without which she could not have raised a war loan abroad, while it will not impose any immediate heavy loss on the Russian exchequer. Instead of the eight million francs received annually from

the Ottoman bank Russia will for the next sixteen (eighteen?) years, draw five million francs from Bulgaria."

Settlement upon these terms will be a great diplomatic triumph for Russia which thus enables Turkey to enforce its demands without loss of prestige, enables Bulgaria to purchase its independence upon its own terms, at the sacrifice on the part of Russia of a part of a debt created for the independence of the Balkan states. M. Isvolsky's project is as generous as it is farsighted and statesmanlike. The complications of the Balkan situation are likely to be eliminated without a trace of ill-feeling to the satisfaction of all the parties in interest.

THE REMISSION OF A PORTION OF THE CHINESE INDEMNITY ¹

In President's Roosevelt's message of December 3, 1907, he asked for authority to reform the Chinese indemnity, paid to the United States for the compensation of losses arising out of the Boxer troubles of 1900, by remitting and cancelling the obligation of China excess above the sum of \$11,655,492.69. The indemnity allotted to the United States by the final protocol signed at Peking, September 7, 1901, amounted in round numbers to over \$20,000,000, and of this sum China had paid to January 1, 1907, a little over \$6,000,000. The desire of the United States was to secure compensation for losses actually suffered by its citizens in their business interests. It was not in any sense of the word in the nature of punishment or exemplary damages, exacted for a definite purpose. It was as just as it was generous that the United States should return the unexpended balance of the indemnity for its retention would be inconsistent with the purpose of the indemnity as understood by the United States and would properly be a cause of irritation to China by making its misfortunes a source of profit to a foreign government. The following quotation from the president's message places the proposed action of the United States in its proper light.

It was the first intention of this government, at the proper time, when all claims had been presented and all expenses ascertained as fully as possible, to revise the estimates and account, and as a proof of sincere friendship for China voluntarily to release that country from its legal liability from all payment in excess of the sum which should prove to be necessary for actual indemnity to the United States and its citizens.

¹ See Vol. 2, p. 160.

This nation should help in every practical way in the education of the Chinese people, so that the vast and populous Empire of China may gradually adapt itself to modern conditions. One way of doing this is by promoting the coming of Chinese students to this country and making it attractive to them to take courses at our universities and higher educational institutions. Our educators should, so far as possible, take concerted action toward this end.

On December 28, 1908, the President of the United States, acting upon the advice of Elihu Root, Secretary of State, issued the following executive order:

Pursuant to the authority of the joint resolution of Congress to provide for the remission of a portion of the Chinese indemnity, approved May 25, 1908, I hereby consent to a modification of the bond for \$24,440,778.81, dated December 15th, 1906, received from China pursuant to the protocol of September 7, 1901, for indemnity against losses and expenses incurred by reason of the so-called Boxer disturbances in China during the year 1900, so that the total payment to be made by China under the said bond shall be limited to the sum of \$13,655,492.69 and interest at the stipulated rate of four per centum per annum, and that the remainder of the indemnity to which the United States is entitled under the said protocol and bond be remitted as an act of friendship, such payment and remission to be made at the time and in the manner hereinafter provided, which I deem to be just, that is to say:

In accordance with the plan of amortization annexed to the original indemnity bond, the amounts payable hereafter by China to the United States would be as set forth in the schedule annexed hereto marked "Schedule A," and identified by the signature of the Secretary of State.

I have caused an account to be made by the Treasury Department in which the payments already made under the original bond are credited as against a debt of \$13,655,492.69, with interest at four per centum per annum beginning July 1, 1901, in lieu of the original sum specified in the bond, and I find that after such credits, and including in such credits the sum of \$85,223.04, which it is assumed will be paid on the 1st of January, 1909, there will remain on that day to be paid and retained by the United States, in satisfaction of the sum of \$13,655,492.69 and interest thereon, the sum of \$9,644,367.60.

It also appears by the said new account that the payment to and retention by the United States of the sums specified in the paper hereto attached, marked "Schedule B," and identified by the signature of the Secretary of State, will satisfy the principal and interest of the said sum of \$9,644,367.60 by the end of the period contemplated in the original plan of amortization. And I direct that after the said 1st day of January, 1909, from the several payments made under the said bond of December 15, 1906, in accordance with "Schedule A," there be retained and paid into the Treasury of the United States only the sums specified in "Schedule B;" and that the remainder of the said several payments so made by China in accordance with "Schedule A" over and above the sums specified by "Schedule B" be returned by endorsing back the drafts therefor, or otherwise, and thus remitted to the Government of China. The sums to be so returned in

each year will be as stated in the paper hereto attached marked "Schedule C," identified by the signature of the Secretary of State.

The provision contained in the original bond for an adjustment of interest because payments are made monthly instead of semi-annually will continue to be applicable to the payments of the sums specified in "Schedule B."

SCHEDULE A.

Year	Amount due yearly, payable half yearly	Monthly installments	Year	Amount due yearly, payable half yearly	Monthly installments
1909.....	\$1,022,683.66	\$ 85,223.64	1925.....	\$1,329,784.75	\$110,815.40
1910.....	1,022,683.66	85,223.64	1926.....	1,329,784.76	110,815.40
1911.....	1,080,787.54	90,065.63	1927.....	1,329,784.75	110,815.40
1912.....	1,080,787.54	90,065.63	1928.....	1,329,784.76	110,815.40
1913.....	1,080,787.53	90,065.63	1929.....	1,329,784.75	110,815.40
1914.....	1,080,787.53	90,065.63	1930.....	1,329,784.76	110,815.40
1915.....	1,264,582.18	105,381.85	1931.....	1,329,784.75	110,815.40
1916.....	1,329,784.76	110,815.40	1932.....	1,919,967.11	159,997.26
1917.....	1,329,784.76	110,815.40	1933.....	1,919,967.10	159,997.26
1918.....	1,329,784.76	110,815.40	1934.....	1,919,967.10	159,997.26
1919.....	1,329,784.75	110,815.40	1935.....	1,919,967.11	159,997.26
1920.....	1,329,784.76	110,815.40	1936.....	1,919,967.09	159,997.26
1921.....	1,329,784.75	110,815.40	1937.....	1,919,967.09	159,997.26
1922.....	1,329,784.75	110,815.40	1938.....	1,919,967.11	159,997.26
1923.....	1,329,784.75	110,815.40	1929.....	1,919,967.10	159,997.26
1924.....	1,329,784.76	110,815.40	1940.....	1,923,374.12	160,281.18

SCHEDULE B.

Year	Principal to be retained	Interest to be retained	Total payment to be retained
1909.....	\$158,814.06	\$385,774.70	\$539,588.76
1910.....	159,966.62	379,622.14	539,588.76
1911.....	166,365.29	373,233.47	539,588.76
1912.....	173,019.90	366,568.86	539,588.76
1913.....	179,940.70	359,648.06	539,588.76
1914.....	187,138.32	352,450.44	539,588.76
1915.....	194,623.86	344,964.90	539,588.76
1916.....	202,408.81	337,179.95	539,588.76
1917.....	210,505.16	329,083.60	539,588.76
1918.....	218,925.87	320,663.89	539,588.76

SCHEDULE B—Continued.

Year	Principal to be retained	Interest to be retained	Total pay ment to be retained
1919	\$227,682.38	\$311,906.38	\$539,588.76
1920	236,789.68	302,799.98	539,588.76
1921	246,261.27	293,327.49	539,588.76
1922	256,111.72	283,477.04	539,588.76
1923	266,356.19	273,232.57	539,588.76
1924	277,010.44	262,578.32	539,588.76
1925	288,090.85	251,497.91	539,588.76
1926	299,614.49	239,974.27	539,588.76
1927	311,599.07	227,989.69	539,588.76
1928	324,063.03	215,525.73	539,588.76
1929	337,025.56	202,563.20	539,588.76
1930	350,506.57	189,082.19	539,588.76
1931	364,526.84	175,061.92	539,588.76
1932	379,107.92	160,480.84	539,588.76
1933	394,272.22	145,316.54	539,588.76
1934	410,043.11	129,545.65	539,588.76
1935	426,444.84	113,143.92	539,588.76
1936	443,502.64	96,086.12	539,588.76
1937	461,242.74	78,346.02	539,588.76
1938	479,692.45	59,896.31	539,588.76
1939	498,880.14	40,708.62	539,588.76
1940	518,835.36	20,753.40	539,588.76

SCHEDULE C.

Year	Amount remitted yearly	Year	Amount remitted yearly
1909	\$483,094.90	1925	\$790,195.99
1910	483,094.90	1926	790,196.00
1911	541,198.78	1927	790,195.99
1912	541,198.78	1928	790,196.00
1913	541,198.78	1929	790,195.99
1914	541,198.78	1930	790,196.00
1915	724,993.42	1931	790,195.99
1916	790,196.00	1932	1,380,378.85
1917	790,196.00	1933	1,380,378.84
1918	790,196.00	1934	1,380,378.84
1919	790,195.99	1935	1,380,378.85
1920	790,196.00	1936	1,380,378.43
1921	790,195.99	1937	1,380,378.43
1922	790,195.99	1938	1,380,378.85
1923	790,195.99	1939	1,380,378.84
1924	790,196.00	1940	1,380,378.86

On July 11, 1908, the American Minister informed the Chinese Government of the action of the United States and in acknowledging on July 14, 1908, the note of the American Minister, the Chinese Government stated:

The Imperial Government, wishing to give expression to the high value it places on the friendship of the United States, finds in its present action a favorable opportunity for doing so. Mindful of the desire recently expressed by the President of the United States to promote the coming of Chinese students to the United States to take courses in the schools and higher educational institutions of the country, and convinced by the happy results of past experience of the great value to China of education in American schools, the Imperial Government has the honor to state that it is its intention to send henceforth yearly to the United States a considerable number of students there to receive their education. The board of foreign affairs will confer with the American minister in Peking concerning the elaboration of plans for the carrying out of the intention of the Imperial Government.

In a supplemental letter dated the same day the Chinese Foreign Office outlined more fully the purpose to which the remitted balance of the indemnity is to be devoted:

Referring to the dispatch just sent to your excellency, regarding sending students to America, it has now been determined that from the year when the return of the indemnity begins 100 students shall be sent to America every year for four years, so that 400 students may be in America by the fourth year. From the fifth year and throughout the period of the indemnity payments a minimum of 50 students will be sent each year.

As the number of students will be very great there will be difficulty in making suitable arrangements for them. Therefore, in the matter of choosing them, as well as in the matter of providing suitable homes for them in America and selecting the schools which they are to enter, we hope to have your advice and assistance. The details of our scheme will have to be elaborated later, but we take this occasion to state the general features of our plan, and ask you to inform the American Government of it. We sincerely hope that the American Government will render us assistance in the matter.

On August 3, 1908, Mr. Root wrote to the American Minister at Peking and enclosed the proposed regulations for the students to be sent to America:

PROPOSED REGULATIONS FOR THE STUDENTS TO BE SENT TO AMERICA.

I. GENERAL STATEMENT.

The students to be sent to America are to be supported out of the indemnity fund remitted by the United States. It is proposed to memorialize the Throne fixing the number of students to be sent abroad, with a statement of the general

arrangements made for them, and at the same time to notify the American minister.

The board of foreign affairs will be responsible for the establishment of the training schools and the appointment of the superintendent of students.

The board of education will be responsible for the examination of the students after their graduation, as the board of foreign affairs may invite the board of education.

The officials appointed by the board of foreign affairs and the American legation shall be jointly responsible for the selection of the students who are to be sent to America, and for their distribution in American educational institutions.

II. THE GENERAL PURPOSE.

The aim in sending students abroad at this time is to obtain results in solid learning. Eighty per cent. of those sent will specialize in industrial arts, agriculture, mechanical engineering, mining, physics, and chemistry, railway engineering, architecture, banking, railway administration, and similar branches, and 20 per cent. will specialize in law and science of government.

III. QUALIFICATION OF STUDENTS.

The requirements will be —

- (a) General intelligence.
- (b) Good character.
- (c) Good health.
- (d) Respectable social position.
- (e) Suitable age.
- (f) Knowledge of Chinese sufficient to write an essay of several hundred characters.
- (g) General knowledge of Chinese classical literature and history.
- (h) Knowledge of English sufficient to enable the student to enter an American university or technical school.
- (i) The completion of a preparatory course in general studies.

IV. THE METHOD OF NOMINATION OF CANDIDATES.

The board of education will choose the most promising students from all the schools and present them for examination. The board of foreign affairs will also call for applications. Students of both these classes must be fully up to the required standard or they will not be accepted as candidates. (Detailed regulations will be drawn up later.)

V. THE EXAMINATION AND CHOICE OF STUDENTS.

Officials appointed by the board of foreign affairs and one official appointed by the American legation will consult together and report to the board the detailed method of procedure. There shall be three tests:

- (a) Candidates must be inspected as to their physical condition by western trained physicians.

(b) They must pass in Chinese.

(c) They must pass in English and general branches. (Detailed regulations will be issued later.)

VI. THE TRAINING SCHOOL.

The board of foreign affairs will establish a training school for students going to America (or branch schools will be established at Tientsin, Hankow, and Canton for the convenience of students from the different provinces). All the accepted candidates will enter this school or schools. Those sent out the first year will be trained for six months and those sent thereafter will be trained for one year. During this time the character and ability of the students will be closely inspected and only those found satisfactory will be sent abroad. Those found unsuitable will be rejected. (Detailed regulations will be issued later.)

VII. THE SUPERINTENDENCE OF THE STUDENTS ABROAD.

At Washington, Chicago, or some other suitable place centrally located the office of the general superintendent will be established. Some one who has graduated from an American university and who has a reputation for ability will be appointed superintendent of students, and four or five assistants will be appointed to attend to the placing of the students, to their finances, and to inspect their studies. These will make regular reports. (Detailed regulations will be issued later.)

VIII.

After the students have completed their courses of study and obtained their diplomas they will be presented by the board of foreign affairs to the board of education to be examined according to the regulations, and they will receive rank as may be determined by the board of education.

The documents regarding this remarkable incident tell their own story and have been set forth without comment. They show that the Americans, whom Europe condemns as the most materialistic and practical people, are nevertheless more idealistic than the European nationalities from whom they are supposed to have derived their inherited traits. At the time of going to press we are not informed that any power entitled to indemnity under the protocol of September 7, 1901, has either proposed or contemplates the remission of the whole or any part of the indemnity exacted from China in a crisis in her internal and foreign relations.

NEW POSTAL REGULATION WITH GERMANY

In the editorial comment for October (3:849) attention was called to the fact that penny postage had been introduced between Great Britain and the United States, and the effect of such reduction upon

the intercourse between foreign nations was pointed out. An agreement between the Postmaster General representing the United States and German postal officials was recently entered into¹ by virtue of which a uniform rate was introduced of two cents an ounce for letters mailed in the United States and ten pfennigs for each twenty grams for letters mailed in Germany, provided, however, that such letters be sent directly to the contracting countries. Letters between the two countries transshipped and forwarded via England and France pay according to the Postal Union rules. The fact that two postage rates thus exist for letters interchanged with Germany is likely to cause some difficulty and confusion unless the rules and regulations issued by the Postoffice Department are carefully observed. The material portions of the order of December 31, 1908, are therefore quoted:

1. Letters specially addressed by the senders are to be dispatched and rated for postage in accordance with said special addresses, except that letters prepaid or short-paid at the rate of postage for direct ocean transportation, or at a less rate, shall not be dispatched by other than direct ocean transportation.

2. Letters not specially addressed by the senders are to be dispatched as follows:

(a) In the event of prepayment, either in full or in part, when the amount of the postage prepaid is in excess of the rate of postage for direct ocean transportation, they are to be dispatched by the most rapid route, that is, via England or France; otherwise, by means of direct ocean transportation.

(b) In the event of being wholly unprepaid they are to be always dispatched by means of direct ocean transportation.

(c) In the cases under "a," where the amount of postage prepaid is not sufficient for the route which it indicates shall be employed, double the amount of the deficiency of the postage for such route shall be collected.

3. Letters which should be dispatched by means of direct ocean transportation, according to directions 1 and 2, and are erroneously dispatched by another route by a post office of the country of origin, are not subject, when the postage prepaid is sufficient for the direct ocean route, to the payment of any additional postage, and in any other case they are to be rated up only at the postage rate for direct ocean transportation.

The new agreement does not provide for a corresponding reduction in the rate for post cards, which remains two cents per card as heretofore.

It is to be hoped that the agreements already reached with Great Britain and Germany are but the precursors of a more general reduction of international postal rates.

¹ Signed in America January 9, and in Germany January 26, but taking effect by mutual agreement on January 1, 1909.

"POLITICAL OFFENCE" IN EXTRADITION TREATIES

From whatever standpoint we approach the question of extradition we see in it the recognition of the solidarity of the nations, because the right of extradition necessarily presupposes that nations are so interested in maintaining the law and order within the family of nations that they agree to surrender fugitives seeking refuge within their boundaries to the home governments in order that the violations of the law may be properly punished. The right of asylum is thus vanishing from international law and in its place we are recognizing a duty, conventional in form, to aid in the administration of justice. It may be that the extradition of a fugitive from justice is a moral duty, an opinion not countenanced by the weight of authority, but the acceptance of the duty by formal convention binds the nations to surrender, the failure to do which taxes them with a violation of treaty obligations. The conventional nature of the duty is seen in the fact that the extradited fugitive can only be tried for the offense for which he was surrendered and he may not be surrendered for an offense not specified in the treaty of extradition. There can be no objection to the surrender of fugitives charged with the grosser crimes, although it may well be that states are unwilling to surrender their own subjects and citizens for crimes alleged to have been committed in foreign parts. A criminal is none the less a criminal because he is a subject or citizen, but national feeling may well regard him in such a different category as to prevent his surrender.

A very different question is raised when it is proposed to surrender fugitives whose sole offense has been of a political character, that is to say, fugitives who for political purposes, such as to overthrow the government and substitute another in its place, or to modify existing governments, have resorted to force, committed acts of violence, and in not a few cases, crimes of the most serious character. We naturally sympathize with one whose act was for the public good however mistaken his judgment, who exposed himself to the loss of life and property without any immediate hope of profit or gain. It is, however, necessary to define the nature of political offense, lest we include in its protection questionable characters who have taken advantage of disorder and commotion to commit crime, and whose act was neither in furtherance of nor connected with a political movement. It is all the more necessary to determine the nature of a political crime because

many of the treaties exclude "political offences" from extradition without attempt to define them.¹ This is not to be wondered at, because it is very difficult to state categorically and in the abstract what is or is not a political offense. As Lord Denman said in the *Castioni* case (1 Q. B. 149):

"I do not think it necessary or desirable that we should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character. * * * The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part."

And in the same case Mr. Justice Hawkins said:

"I can not help thinking that everybody knows that there are many acts of a political character done without reason, done against all reason; but at the same time, one can not look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for purposes of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over."

Whether an act is political or not is therefore largely a matter of interpretation and must be considered in the light of facts and circumstances attending its commission.

It may be questioned whether the progress of constitutional and representative government will not cause political offences to be looked upon with less favor than formerly, and that uprisings against a well-regulated and orderly government will deprive the fugitive of the sympathy lavished upon him not many years ago when constitutional government was being forced from unwilling hands. It is not too much to say that crimes committed by anarchists, by those to whom organized government is repulsive may be excluded from the category of non-extraditable offences, and that the assassination of sovereigns of mon-

¹ See Supplement to this issue, pp. 144 et seq.

archical countries and chief executives of republican states,² will no longer enjoy the immunity to which political fugitives are entitled.

The recent trial of the Russian Rudowitz in Chicago and the refusal to extradite, for the murder in Russia of a fellow-citizen and two defenceless women, accused of betraying revolutionary plots to the Russian government, may well give us pause, lest in our sympathy with alleged political offenders we place a premium upon the commission of unspeakable atrocities. The exclusion of assassins of heads of states and anarchists from the benefit of political offences leads to the conclusion that some limitations must be imposed upon the immunity previously granted and it may be that a reexamination of political offences in the light of experience and practice may suggest further limitations so as to separate ordinary crime from the pretence of political activity. A fugitive who has really committed a political crime should not be surrendered, but international justice and comity demand that an ordinary crime should not be invested with a political character for the sole purpose of defense. The question is as complicated as it is delicate, but a reexamination of the essentials of a political offence seems necessary in order that a right of asylum may not be abused and that we may not extend protection to unworthy persons.

THE NEWFOUNDLAND FISHERIES QUESTION

The controversy between the United States and Great Britain in relation to the Northeastern or Newfoundland Fisheries, which has been a subject of diplomatic negotiation for nearly seventy years, is to be finally settled by a submission to the Permanent Court at The Hague in accordance with the general treaty of arbitration between the two powers concluded April 4, 1908.³ On January 27th⁴ last Secretary of State Root and Ambassador Bryce signed a special agreement as provided by the treaty determining the constitution of the tribunal and reciting the questions to be decided.

The interpretation of the language of article I of the treaty of October 20, 1818, is the subject which has been the cause of difference between the countries and which is to be judicially determined. The text of the article is as follows:

² See articles quoted in Supplement from treaties with the following countries: Belgium, p. 149; Brazil, p. 147; Denmark, p. 149; Guatemala, p. 150; Haiti, p. 144; Mexico, p. 147; Portugal, p. 163; Russia, p. 145; Spain, p. 150.

³ See Supplement, 2:298.

⁴ See supplement to this issue, p. 168.

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks from Mount Joly on the southern coast of Labrador, to and through the Straights of Belleisle and thence northwardly indefinitely along the coast, without prejudice however, to any of the exclusive rights of the Hudson Bay Company: and that the American fishermen shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; provided however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

It will be observed that by this treaty American fishermen were excluded from taking fish in waters within three marine miles of the British colonial coasts except along southern and western Newfoundland, Labrador, and the Magdalen Islands; and that they were also prohibited from landing on the coasts to cure and dry fish except on the Labrador coast and on a small strip of the southern shore of Newfoundland. The American fishing vessels were, however, permitted to enter the prohibited coastal waters for certain purposes, namely, to find shelter, to repair damages, and to procure wood and water, but these privileges were to be exercised under such restrictions as were necessary to prevent their abuse.

The first dispute concerning the treaty arose about twenty-five years after the signature through the seizure by Nova Scotia revenue vessels of American craft, which were claimed to have taken fish within the three-mile limit, a charge denied by the Americans. The question in

controversy was: upon what basis was the prohibited belt of marginal sea to be fixed? In the diplomatic correspondence which followed the British government asserted that the words of the treaty, "coasts, bays, creeks, or barbours" determined that the line, from which the three miles were to be measured, was such that it crossed the entrance of every bay regardless of its width. This the United States denied, claiming that the language referred only to bays, the width of which did not exceed six marine miles.

In 1854 the controversy, which had been dragged out by ingenious arguments upon both sides, came for a time to an end by the reciprocity treaty of that year which gave to the fishermen of the United States and the British colonies mutual privileges of resort to all coastal waters. With the expiration of that treaty in 1866 the question again arose, but was quieted for a few years by a system of licenses granted to American fishermen by the colonial governments. However, it shortly became a cause of irritation through the renewal of the Canadian policy of making seizures, but the Treaty of Washington (1871) ended the difficulty by reestablishing reciprocal trade and fishing privileges. Upon the expiration of that last venture in reciprocity between the United States and its northern neighbors, the colonial authorities commenced once more to make seizures, and the diplomats at Washington and London attempted to reach a settlement by a new agreement. The Bayard-Chamberlain treaty of 1888 was negotiated, but it failed to receive the assent of the United States Senate. Two years later Secretary Blaine and Honorable Robert Bond of Newfoundland came to an agreement in the form of a reciprocity convention, which was to have settled the dispute so far as the Newfoundland fishery was concerned. Canada, however, not being included in the treaty and fearing that it would interfere with its plan of reciprocity with the United States, objected to the ratification and as a result the British government declined to sanction the agreement.

For twelve years after this failure the American fishermen prosecuted their trade without interruption, but Newfoundland being specially desirous of a reciprocity agreement with the United States, Sir Robert Bond made a second visit to Washington and prepared with Secretary Hay a treaty in relation to the fisheries and reciprocal trade, which was signed November 8, 1902; but to it the Senate never gave its assent.

With the failure of the Hay-Bond treaty the attitude of Newfoundland toward the American fishermen changed. As a result new ques-

tions were raised as to the fishing rights of the United States in the coastal waters of Newfoundland. The colonial government adopted fishery regulations as to the methods and times of taking fish, together with other restrictions, claiming that they applied to Americans as well as to their own people. These the Americans considered burdensome and as discriminating against them in favor of the local fishermen. The government also adopted certain customs regulations and applied them to American fishing vessels, which, it was alleged, interfered materially with the exercise of their fishing rights. Canada had also claimed that fishing vessels of the United States resorting to the bays and harbors of the Dominion for shelter and repairs should enter and clear at custom houses.

The subject was in this unsatisfactory state, the situation becoming more and more acute, when Secretary Root took up the negotiation, which finally resulted in the special agreement of January 27, 1909, by which the questions in controversy are to be decided by a tribunal of five arbitrators selected from the panel of The Hague Permanent Court, one arbitrator being from each of the disputant countries, and three from foreign states.

The settlement of this controversy, which has so long vexed the statesmen of the United States and Great Britain, will be a matter for congratulation to both countries, as it will determine definitely and for all time their respective rights in the coast fisheries of the North Atlantic. The negotiation of the treaty of April 4, 1908 and the special agreement of last January adds another triumph to the list which bears witness to the successful diplomacy which has characterized the secretaryship of the Honorable Elihu Root.

THE INSTITUTE OF INTERNATIONAL LAW

The editors beg to call attention to the statement in the last issue, page 188, regarding the newly elected associate members of the Institute of International Law. In place of Professor Triepel of Tübingen should be the name of Christian Meurer, professor of public law at the University of Würzburg, whose authoritative work on the First Hague Conference appeared in two volumes in 1907. The official report of the meeting, which has just been received, also announces that M. Léon Bourgeois, the prominent first member of the French delegation at the Second Hague Conference, was elected to honorary membership during the same session of the Institute.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

November, 1908.

- 16 BELGIUM—NICARAGUA. Ratifications exchanged at Guatemala of convention relative to exchange of parcels post signed at Managua, January 17, 1908. *Ga. oficial*, January 19, 1909.
- 26 BRAZIL. Decree No. 2004 regulating the naturalization of aliens. Art. 1. The presentation of documents signed by diplomatic or consular agents required by Article 3 of the Decree No. 1805 of the 12th December 1907, Article 4, single paragraph No. 5, and Article 5, section 3, of the decree No. 2948 May 14, 1908 (text, *B. A. R.*, August, 1908), shall be dispensed with for purposes of naturalization. *Cd.* 4465. On expulsion of foreigners from Brazil see this *J.*, vol. I, documents, p. 410; *J. du dr. int. privé*, 34:1217, 1166.
- 30 ARGENTINE REPUBLIC—CHILE. Ratifications exchanged at Buenos Aires of convention signed at Buenos Aires, September 7, 1904. Free customs entry of works of art for the annual exhibitions of the Santiago and Buenos Aires salons of fine arts, and similar conditions of admission thereto. *B. oficial*, Buenos Aires, December 24, 1908.

December, 1908.

- 1 ARGENTINE REPUBLIC—PANAMA. Direct money order exchange organized on basis of Rome arrangement. *L'Union postale*, 33:176.
- 1 ARGENTINE REPUBLIC—PARAGUAY. Live stock convention takes effect. Signed at Buenos Aires May 30, 1908. *B. oficial* (Buenos Aires), December 1.
- 1 GREAT BRITAIN—NETHERLANDS. Agreement signed at The Hague respecting the exchange of insured letters and boxes. *Treaty ser.*, 1908, No. 37. In modification of the stipulations of articles 4 and 5 of the agreement signed at Rome, May 26, 1906, the sea rate applicable to the transmission between Queensborough and Flushing of insured boxes exchanged between the Netherlands and the countries to which the Netherlands serve as an intermediary on the one part, and Great Britain and the countries to which Great Britain serves as intermediary on the other part, is fixed at 25 centimes for each article. No insurance fee is collected for the transmission of insured letters and boxes between Queensborough and Flushing. *Staatsb.*, 1909, No. 18.
- 1 SWEDEN. Adhesion to international convention signed at Berne, October 14, 1890 (*State Papers*, 82:771, 796; *N. R. G.*, 2:19:289), takes effect. Freight transportation by rail. *B. usuel*, November 1; *Monit.*, December 1. See November 2, 1907 and September 22, 1908.
- 3 CHINA. Decree referring to decree of August 27, 1908, respecting a constitution, and expressing intention to carry it out. *North China Herald*, December 5; *The situation in China*, *id.*, 89:629. See August 27, 1908.
- 4 INTERNATIONAL NAVAL CONFERENCE assembled at London. Object: — To assure success of the prize court convention signed at The Hague October, 1907. *Times*, December 4, 5.
- 5 ARGENTINE REPUBLIC—BRAZIL. Ratifications exchanged at Buenos Aires of treaty of general arbitration signed at Rio de Janeiro September 5, 1905. *B. oficial*, December 24, 1908.
- 5 GERMANY. Proclamation of accession of German protectorates to the international radiotelegraphic convention signed at Berlin November 3, 1906. *Reichs-G.*, 1908, No. 59; *The politics of radiotelegraphy*, *Edinburgh R.*, 207:465; *R. di dr. int.*, 1:562; *Documents de la conférence radiotélégraphique internationale de*

December, 1908.

Berlin, 1906, Departement des postes, Berlin, 1906; Zuculin: I cavi sottomarini e il telegrafo senza fil nel diritto di guerra, Rome, 1907; Lorentz: Les cables sous-marins et la télégraphie sans fil dans les rapports internationaux, Nancy, 1906; Report from the select committee on radiotelegraphic convention with the proceedings of the committee, Sessional paper 246, London, 1907; Arch. dipl. 104:3; La nouvelle R., 3:307. See November 3, 1906, November 8, 1907, and July 1, 1908.

- 5 PERU—UNITED STATES. Treaty of arbitration signed at Washington. Ratification advised by the Senate, December 10. Ratified by the President March 1, 1909.
- 6 COLOMBIA—FRANCE. Treaty of general arbitration signed at Bogota.
- 7 GREAT BRITAIN—JAPAN. Money order convention signed at Tokyo; signed at London November 4, 1908. Takes effect January 1, 1909.
- 7 NICARAGUA—UNITED STATES. Naturalization convention signed at Managua. Ratification advised by Senate January 21, 1909; ratified by the President March 1, 1909.
- 7 PERMANENT COMMISSION OF THE INTERNATIONAL SUGAR CONVENTION met at Brussels. *Times*, December 8.
- 10 BRAZIL—UNITED STATES. Ratification advised by Senate to naturalization convention signed at Rio de Janeiro April 27, 1908. Ratified by the President December 26, 1908.
- 10 NOBEL PEACE PRIZE awarded by Norwegian Storting to K. P. Arnoldson, founder of the Swedish Peace Society, and Frederik Bajer, of Denmark. *Times*, December 11; this *J.*, 3:179.
- 11 INDIA. Indian criminal law amendment act passed by Governor General's Legislative Council. Acts of the Legislative Council become law at once but are subject to disallowance by the Crown on the advice of the Secretary of State. *Cd.*, 3912, 4426.
- 12 COLOMBIA—JAPAN. Promulgation in Japan of treaty of amity commerce and navigation signed at Washington May 25, 1908. Ratified by Colombia August 18, 1908. *B. del min. de rel. ext.*, 2:20, 5.
- 12 NETHERLANDS—VENEZUELA. The Dutch warship Gelderland captured Venezuelan coast-guard ship Alix near Puerto Cabello and towed her to Willemstad. *See September 3 and December 31,*

December, 1908.

1908. Reprisals. See letter of *J. Westlake*, *Times*, December 24, 1908, on the need of making the doctrine of reprisals precise.

- 13 MONTENEGRO. Decree that from December 14 goods imported from countries with which Montenegro has no commercial treaty shall be taxed at the maximum tariff. *Times*, December 14.

- 15 NETHERLANDS—SWEDEN. Ratifications exchanged at The Hague of treaty signed at Stockholm February 26, 1908. Dutch law approving, December 7, 1908; proclamation, January 19, 1909. *Staatsb.*, 1908, No. 372; *id.* 1909, No. 13. To regulate salvage of shipwrecked vessels. The necessary measures are to be taken by the consular officers of the country to which the vessel belongs.

Art. 2. The High Contracting Parties engage to submit to the Permanent Court of Arbitration at The Hague the differences which may arise between them on the subject of the application or the interpretation of the present Convention, and which cannot be settled through the diplomatic channel.

In each particular case the respective Governments shall sign a special compromis, determining precisely the question at issue, the extent of the powers of the arbiter or of the arbitral court, the mode of designation thereof, the language which the arbiter or the arbitral tribunal shall use and those which may be used before it, the amount that each of the High Contracting Parties shall advance for expenses, as well as the rules to be observed as to the formalities and adjournments.

- 16 HOLY SEE—SPAIN. Exchange of notes at Madrid, in reference to Article 2 of the protocol signed July 12, 1904, and ratified July 13, 1908. Personnel of the mixed commission. *Ga. de Madrid*, December 25.

- 16 NETHERLANDS—PORTUGAL. Netherlands proclamation of treaty signed at The Hague October 1, 1904, fixing boundary of their possession in Timor, an island of the Malay archipelago. Netherlands law approving, December 30, 1905; exchange of ratifications at The Hague October 29, 1908. *Staatsb.*, 1905, No. 382; *id.* 1908, No. 414. The new boundary is based upon the report of the mixed commission instituted in virtue of Article II of the convention signed at Lisbon June 10, 1893. *State Papers*, 85:394; *N. R. G.*, 2:22:463. Timor was divided between Portugal and Netherlands by treaty signed at Lisbon April 20, 1859. *Lagemans*, 5:66; *Nova collecção de tratados*.... Lisboa, 1890, 1:225; *State Papers*, 50:116.

December, 1908.

Article 13. The High Contracting Parties reciprocally concede, in case of partial or total cession of their territory or their sovereign rights in the Archipelago of Timor and Solor, the right of preference on like or equivalent terms to those that may have been offered. Article 14. All questions or all differences respecting the interpretation or execution of the present Convention, if they cannot be resolved amicably, shall be submitted to the Permanent Court of Arbitration conformably to the dispositions provided in Chapter II of the international convention of July 29, 1899, for pacific settlement of international disputes.

The above-quoted article 13 is a restatement of the declaration signed at Lisbon July 1, 1893 (*State Papers*, 85:396), made an integral part of the treaty of June 10, 1893, "to insure the result of their common action which tends especially to encourage the commerce and industries of their nationals by guaranties of security and stability."

- 17 FRANCE. Law approving convention signed at Berne September 26, 1906, to prohibit the manufacture, importation and sale of matches which contain white phosphorus. *J. O.*, December 19. *Mahaim: La conférence de Berne concernant la protection ouvrière*, *R. économique int.*, 2:551; *Arch. dipl.*, 104:17; *R. di dr. int.*, 1:564; *La justice int.*, 2:146; *Actes de la conférence diplomatique pour la protection ouvrière réunie à Berne du 17 au 26 septembre, 1906*, Berne, 1906; *Conférence internationale pour la protection ouvrière à Berne (du 8 au 17, mai, 1905)*, n. p., n. d.; *Compte rendu de la quatrième assemblée générale du comité de l'association internationale pour la protection legal des travailleurs tenue à Genève les 26, 27, 28 et 29 septembre, 1906*, Paris, 1907. See December 21, 1908.
- 17 HAITI. Legislature elected Antoine Simon president for term ending May 15, 1915. A revolution was inaugurated at Cayes November 19, before which Nord Alexis fled, embarking on a French warship. *Annuaire de législation haitienne (Mathon)*, 1908, Port-au-Prince, 1909; *R. dipl.*, January 17; *The problem of Haiti*, *Times*, December 14.
- 17 TURKEY. Opening of parliament. *The Turkish parliament*, *Spectator*, December 19; *Fortnightly R.*, 85:165. See July 24, 1908. Additional references: *The new era in Turkey*, *Edinburgh R.*, 208:487; for origin and nature of Young Turk agitation, see Ali Haydar Midhat Bey: *The life of Midhat Pasha*,

December, 1908.

- London, 1903; *Hoskins: The new Turkish parliament, Independent*, October 29; *Vambéry: Europe and the Turkish constitution, Nineteenth Century*, 64:724; *Lloyd: Some aspects of the reform movement in Turkey, National R.*, 52:412; *Gottheil: The young Turks and the old Turkey, Forum*, 40:522; *Buxton: The young Turks, Nineteenth century*, 65:16; *Ben Kendim: The opening of the Turkish parliament, Spectator*, January 2; *Racowski: Turquie constitutionnelle, Les documents du progrès*, 2:830.
- 19 HONDURAS—GUATEMALA, SALVADOR. Judgment of the Central American court of justice. *Mém. dipl.*, January 31. Judgment for defendants, *B. del min. de rel. ext.* (San Salvador); *Sentencia en el juicio promovido por la república de Honduras contra las repúblicas de El Salvador y Guatemala, 1908*, San Jose; *Memoria del min. de rel. ext.*, Tegucigalpa, 1909. This court was established in virtue of the treaty signed at Washington December 20, 1907, by Honduras, Guatemala, Salvador, Nicaragua and Costa Rica. The decision appears *supra*, p. 434.
- 21 NETHERLANDS—PORTUGAL. Netherlands royal decree of proclamation of general arbitration treaty signed at The Hague October 1, 1904. *Staatsb.*, 1908, No. 420. See *October 29, 1908*.
- 20 ITALY. Law giving effect to convention signed at Berne September 19, 1906, additional to the convention of October 14, 1890, respecting railway freight transportation. *Ga. ufficiale*, December 30, 1908; *B. del min. aff. est.*, December. See *December 1, 1908*.
- 21 GREAT BRITAIN. Order in council, under authority of International Copyright Acts 1844 to 1866, extending to Liberia, as from October 16, 1908, the orders in council of November 28, 1887, and March 7, 1898. *London Ga.*, December 22. See *October 16, 1908*.
- 21 SALVADOR—UNITED STATES. Arbitration convention signed at Washington. Ratification advised by the Senate January 6, 1909; ratified by the President March 1, 1909.
- 21 GREAT BRITAIN. White phosphorus matches prohibition Act. On September 26, 1906, at the Berne International Conference on Labor Regulation, a convention was signed by Germany, Denmark, France, Italy, Luxemburg, Netherlands, and Switzerland, agreeing to prohibit in their respective countries the manufacture, importation, and sale of matches which contain white phosphorus. For reasons explained in *Cd.*, 3271, Great Britain was not at that time able to agree to this prohibition.

December, 1908.

- 21 VENEZUELA. Decree opening Zulia river to commerce with Colombia. *B. A. R.*, March.
- 22 MEXICO. Immigration law takes effect. *Diario oficial*, December 22.
- 23 ARGENTINE REPUBLIC—UNITED STATES. Treaty of general arbitration signed at Washington. Ratification advised by the Senate January 6, 1909; ratified by the President March 1, 1909.
- 24 FRANCE—ITALY. Exchange of notes at Paris renewing arbitration treaty signed at Paris December 25, 1903. *J. O.*, December 31; *State Papers*, 96:620; *Trattati e convenzioni fra il regno d'Italia* . . . 17:283; *N. R. G.*, 2:31:610.
- 24 CUBA. José Miguel Gomez elected president by the electoral college.
- 25 FIRST PAN-AMERICAN SCIENTIFIC CONGRESS at Santiago. A Latin-American congress was held in 1898 at Buenos Aires, the second at Montevideo 1901, the third at Rio de Janeiro in 1905. *Times*, January 4; *American Political Science R.*, 2:441; adjourned January 5, 1908. Next congress at Washington October 12, 1911. *Reinsch: The first Pan-American Scientific Congress, Independent*, 66:370.
- 26 UNITED STATES—URUGUAY. Naturalization convention ratified by President of the United States; ratification advised by the Senate December 10, 1908. Signed at Montevideo August 10, 1908.
- 30 AUSTRIA-HUNGARY—SERVIA. Notes exchanged at Belgrade prolonging for three months the *modus vivendi* under which the terms of the treaty signed at Vienna March 14, 1908, are enforced pending its ratification by the Austrian and Hungarian parliaments. *Times*, December 30. *See September 1, 1908.*
- 30 AUSTRIA—GERMANY. Ratifications exchanged at Berlin of agreement signed at Berlin November 17, 1908. *Reichs-G.*, 1908, No. 62. Industrial property.
- 30 GERMANY—HUNGARY. Ratifications exchanged at Berlin of agreement signed at Berlin November 17, 1908. *Reichs-G.*, 1908, No. 62. Industrial property.
- 31 VENEZUELA. Decree revoking decrees of April 28 and May 14, 1908, respecting transshipment at Carúpano and Cristobal Colón for eastern Venezuelan ports and at Puerto Cabello for western. *Ga. oficial*, December 31. *See September 3, 1908.*

January, 1909.

- 1 BELGIUM AND FRANCE—GREAT BRITAIN. Special arrangement for exchange of boxes with declared value inaugurated. This service is on the whole executed on the conditions of the international arrangement signed at Rome. *L'union postale*, 34:32.
- 1 AUSTRIA AND HUNGARY. Adhesions take effect to (1) international convention signed at Paris, March 20, 1883; (2) arrangement signed at Madrid April 14, 1891; (3) protocol signed at Madrid April 15, 1891; (4) additional act signed at Brussels modifying Paris convention December 14, 1900, (5) additional act signed at Brussels December 14, 1900, modifying Madrid arrangement. The notice of adhesion was given to the Swiss Federal Council November 30, 1898, and stated that the notice of adhesion of these two countries applied *ipso jure* to Bosnia and Herzegovina. Each of the two countries is put in the first class as to contribution to the expenses of the Bureau. Industrial property. *Recueil des traités... en matière de propriété industrielle*, Berne, 1904.
- 1 GERMANY. Accession takes effect for protectorates to international convention signed at Berne September 9, 1886. Protection of literary and artistic property. *Reichs-G.*, 1908, No. 56; *Dr. d'auteur*, 21:157. Applies also to the act additional to that convention and to the interpretative declaration signed at Paris May 4, 1896. *J. O.*, December 18; *Treaty ser.*, 1908, No. 36. A declaration in this sense was made by the German delegation at the third sitting on November 13, 1908, of the Berlin conference for revision of the International Union Convention. The German legation at Berne notified Switzerland November 23. The treaty between France and Germany signed at Paris April 8, 1907, being, by virtue of its Article II, supplementary to the Berne convention, the accession of the French and German colonies and possessions thereto is comprehended in this accession. *J. O.*, January 10, 1909; *Dr. d'auteur*, 22:18; *Reichs-G.*, 1908, No. 57.
- 1 ITALY—SERVIA. Collection order service inaugurated on the basis of a special arrangement. *L'Union postal*, 34:16. A similar service was inaugurated this date between Germany and Surinam.
- 1 FIRST INTERNATIONAL CENTRAL AMERICAN CONFERENCE opened at Tegucigalpa. Conferences are to be held annually in January for consideration of fiscal questions and such other matters as the participating governments may see fit to submit. *B. A. R.*, February; *B. del min. de rel. ext.* (San Salvador), 1:22.

January, 1909.

- 4 GREAT BRITAIN—ITALY. Exchange of notes at London renewing for a further period of five years the arbitration agreement signed at Rome February 1, 1904. *Treaty ser.*, 1904, No. 3; *id.*, 1909, No. 2.
- 5 MOROCCO. Note of the powers signatory to the Act of Algeciras handed to Morocco at Tangier, recognizing Mulai Hafid as legitimate sultan. *Mém. dipl.*, January 10. See September 22, 1908, and January 9, 1909. *Q. dipl.*, 27:118.
- 6 FRANCE—UNITED STATES. Extradition treaty signed at Paris.
- 6 KONGO. Belgian decree in pursuance of the protocol signed at Brussels July 22, 1908, by Germany, Kongo, Spain, France, Great Britain and Portugal.

Art. 1. The importation of all kinds of firearms, ammunition, and gunpowder destined for natives, as well as the sale and delivery of all kinds of firearms, ammunition, and gunpowder to natives, are prohibited in that portion of the Belgian Congo's territories defined in Article 2 hereof.

This prohibition shall not, however, apply to firearms, ammunition, and gunpowder of which the Governor-General may, in entirely exceptional cases, deem it expedient to allow delivery to trustworthy natives, nor to firearms, ammunition, and gunpowder imported in transit and destined for regions outside the said territories.

In force for four years from February 15, 1909. *B. int. des douanes*, No. 3; *Monit.*, January 17, 1909.

- 7 HAITI—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate January 13, 1909; ratified by the President March 1, 1909.
- 7 BOLIVIA—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate January 13, 1909; ratified by the President March 1, 1909.
- 7 ECUADOR—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate January 13, 1909; ratified by the President March 1, 1909.
- 9 MOROCCO. Response of Mulai Hafid to the note delivered him by the dean of the diplomatic corps at Tangier announcing to him that the powers had recognized him as Sultan. Text, *Mém. dipl.*, January 31.
- 9 COLOMBIA—UNITED STATES. Treaty signed at Washington. Panama Canal. Ratification advised by the Senate February 24, 1908. *Times*, January 11.

January, 1909.

- 9 PANAMA—UNITED STATES. Treaty signed at Washington. Panama canal. Approved by Senate February 24, 1908. *Times*, January 11.
- 9 COLOMBIA—PANAMA. Treaty signed at Washington adjusting pecuniary and other relations.
- 9 UNITED STATES—URUGUAY. Arbitration convention signed at Washington. Ratification advised by the Senate January 13, 1909; ratified by the President March 1, 1909.
- 11 GREAT BRITAIN—UNITED STATES. Treaty signed at Washington providing for the settlement of international differences between the United States and Canada. *Times*, January 28.
- 11 GREAT BRITAIN—SPAIN. Exchange of notes at London renewing for a further period of five years the arbitration agreement signed at London February 27, 1904. *Treaty ser.*, 1904, No. 4; *id.*, 1909, No. 3.
- 12 CHINA—JAPAN. Exchange of notes at Peking ratifying telegraphic convention signed October 12 and the supplementary agreement signed November 7. *Times*, January 13.
- 13 COSTA RICA—UNITED STATES. Arbitration convention signed at Washington. Ratification advised by the Senate January 20, 1909; ratified by the President March 1, 1909.
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- 25 GERMANY—VENEZUELA. Treaty of friendship commerce and navigation signed at Caracas. Most favored nation clause covering persons, property and trade. *R. dipl.*, February 7.
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HENRY G. CROCKER.

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¹ When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

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² Official publications of Great Britain, India, and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, Eng.

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PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS.

UNITED STATES V. VAN DER MOLEN

(163 Federal Reporter, 650)

August 10, 1908

KNAPPEN, *District Judge*. Application is made on behalf of the United States, under section 15 of the immigration and naturalization act (*Act June 29, 1906, c. 3592, 34 Stat. 601 [U. S. Comp. St. Supp. 1907, p. 427]*), to cancel the certificate of citizenship issued to said respondent by the circuit court for the County of Newaygo, upon the ground that the court was without jurisdiction to admit the applicant to citizenship, from the fact that less than two years had intervened between the date of the declaration of intention and the date of the making and filing of the petition for citizenship. The declaration of intention was made March 28, 1905. The petition for citizenship was filed March 9, 1907, and thus less than two years after the making of the declaration of intention. Hearing was not had, however, until after the expiration of the two years.

The second subdivision of section 4 of the act requires that the alien "shall make and file" his petition for citizenship "not less than two years nor more than seven years after he has made such declaration of intention." It seems to have been the view of the court admitting to citizenship that the two-year limitation applied to the date of admitting to citizenship, and not to the date of making and filing application therefor. I am unable to agree with this construction. The language of the subdivision in question is express and explicit that the petition shall be made and filed not less than two years after the declaration of intention. The act proceeds throughout upon the theory that the right to citizenship must exist at the date of the filing of the petition therefor. The alien's right to citizenship is, by the express terms of the act, made to depend upon his possessing the requisite qualification at the date of the making and filing of such application. To illustrate: by a later provision of the second subdivision of section 4, there is required to be attached to the petition the affidavits of two witnesses as to the continuous residence of the applicant within the United States for at least five years, and of the state, territory, or district of at least one year, "immediately preceding the date of the filing of his petition." Upon the

hearing, the proof of residence within the United States and within the state or territory is directed, not to the date of the hearing, but to the date of the application. It must be made to appear to the satisfaction of the court that "immediately preceding the date of his application" the applicant has resided continuously within the United States for at least five years, and within the state or territory at least one year. The recital in the prescribed form of certificate of naturalization (not the order of the court) of finding of fact of the statutory period of residence "immediately preceding the date of the hearing of his petition" (as was required by the former naturalization law) was probably adopted by inadvertence.

If the two-year limitation is to be construed as applying only to the date of hearing, there is no apparent reason why the application should not be made at any time, and even within a day after the filing of the declaration of intention. A construction which would permit such result is entirely out of harmony with the spirit and express provisions of the act. For example: sections 5 and 6 require the clerk of the court to give at least ninety days' notice of the petition by public posting, showing, among other things, the date, as nearly as may be, for the final hearing of the petition, and the names of the witnesses whom the applicant expects to summon in his behalf. This notice is required to be given "immediately after filing the petition." The court is required to fix, by rule of court, stated days for hearing such petitions, and final action thereon may be had only on such stated days. Provision is also made for issuing subpoenas for the witnesses to appear upon the day set for final hearing; and by section 11 the United States is given the right to appear before the court for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter affecting the right to admission to citizenship, together with the right to call witnesses, produce evidence, and be heard in opposition to the granting of citizenship. These provisions are inconsistent with the idea that the petition could be filed nearly two years, if desired, previous to a date when hearing could possibly be permitted.

It is clear, to my mind, that the proceedings for admission to citizenship, involving, as they do, the formal filing of a petition in court, notice to and opportunity to be heard by an opposite party, and a judicial hearing, necessarily contemplate that the applicant is entitled to the decree sought at the time of application therefor. As said by Judge Dallas, *In Re Bodek*. (C. C.) 63 Fed. 814 (in construing the previously existing naturalization act):

An applicant for naturalization then is a suitor, who by his petition institutes a proceeding in a court of justice for the judicial determination of an asserted right. Every such petition must, of course, allege the existence of all facts and the fulfillment of all conditions upon the existence and fulfillment of which the statutes which confer the right asserted have made it dependent.

The petition in the case under consideration showed on its face that two years had not elapsed between the declaration of intention and the making or filing of the petition.

It is true there is at first sight an apparent inconsistency between the requirement in the first subdivision of section 4, that the declaration of intention must be made "two years at least prior to his admission," and the requirement of the second subdivision, that the petition for citizenship be made and filed "not less than two years * * * after he has made such declaration of intention;" but there is no necessary inconsistency, and by the construction I have adopted effect can be given both provisions, while the construction sought by respondent would not give effect to the express provision of the second subdivision.

Is the provision in question mandatory? Section 4 declares that the alien may be admitted to citizenship in the manner provided by the act, "and not otherwise;" and section 15 makes express provision for canceling certificates of citizenship when illegally procured. The respondent does not lose his right of citizenship by making application too early, but is permitted to make new petition therefor, and without a new declaration of intention. I am constrained to hold that the explicit language of the statute, forbidding the filing of petition in less than two years after the making of declaration of intention, is mandatory. Being mandatory, the failure to comply with it is jurisdictional. It follows that the proceedings which resulted in the certificates of citizenship were without jurisdiction, and the certificates must be canceled.

An order for cancellation will accordingly be made.

YANGTZE INSURANCE ASSOCIATION V. INDEMNITY MUTUAL
MARINE ASSURANCE COMPANY

Law Reports, King's Bench Division, (1908), 1:910

Trial of action before *Bigham, J.*, without a jury.

The action was on a policy of reinsurance dated December 13, 1904, and underwritten by the defendants. The terms of the policy and the facts of the case, as stated by the judge in his judgment, were as follows:

The plaintiffs underwrote a policy for £18,000 on the steamer *Nigretia* at and from Shanghai to Vladivostock, while there for not exceeding twelve days whilst discharging the cargo, and thence to one port in China in ballast. The policy contained a warranty "not to carry cargo other than kerosene oil," and the insurance was to cover "the risk of capture." The policy was made in Shanghai. The plaintiffs were anxious to reinsure part of the risk, and accordingly on October 28, 1904, they telegraphed from Shanghai to their London office to "reinsure £15,000, including war risk, warranted no contraband of war." The London office succeeded in getting a slip initialled by different underwriters, including the defendant company; but as there was an uncertainty as to the meaning of the warranty "no contraband of war," which affected the question of premiums, the London office telegraphed to the Shanghai office on October 29 as follows: "S. S. *Nigretia*. — Reinsurance has been effected as required. There is some doubt as to the meaning of 'warranted no contraband of war.' It is understood that cargo oil kerosene only you guaranteeing not contraband. It is of utmost importance or otherwise thirty guineas per cent." The meaning of this telegram was that the underwriters were uncertain whether the Japanese courts might not regard kerosene as contraband, and they required the plaintiff company to guarantee that it was not contraband, intimating that in the absence of such a guarantee the premium would be thirty guineas per cent. This telegram was answered by the Shanghai office on October 31 as follows: "S. S. *Nigretia*. — Cargo oil kerosene only. We will guarantee that consul for Japan has to-day written British consul that kerosene not regarded contraband by Japanese Government if shipped anywhere. Cannot give further guarantee. Steamer clears Vladivostock. Are you satisfied?" This telegram was shown by the London office to the different underwriters, and was accepted as satisfactory. The slip, which up to this point had contained in this connection only the words "warranted no contraband," was then amended by adding to those words the further words, "On basis as per cable dated Oct. 31/04," and the signatories to the slip initialled the telegram so as to identify it. The defendant company underwrote £2,000. The premium was agreed at fifteen guineas per cent. Subsequently, namely, on December 13, 1904, the defendants issued their formal policy, on which the present action is brought. The policy, following the terms of the slip, contains the following provision: "Warranted no contraband of war on basis of cable dated 31 October 1904 copy of which attached hereto;" and pinned to

the policy is a typed copy of the telegram. The policy further provides as follows: "Being a reinsurance of the Yangtze Insurance Association Limited, subject to the same clauses and conditions as in the original policy, and to pay as may be paid thereon (but warranted free from particular average) and all clauses as in the original policy including war risk."

At this time a state of war existed between Russia and Japan, and on December 19, 1904, while on the insured voyage to Vladivostock, the *Nigretia* was captured by a Japanese cruiser and taken to the port of Sasebo, in Japan, where she was condemned by the Japanese prize court. The circumstances under which she was condemned appear from the judgment of the prize court. This judgment finds that on December 16, 1904, two Russian naval officers, who had assumed German names, were received on board the *Nigretia* at Shanghai as passengers to Vladivostock. There was no proof that the captain or owners of the vessel knew that these two persons were Russian officers; but, on the other hand, the court found that there was no proof that they were ignorant of the fact, and the court held that the ship "must be confiscated as the vessel was actually engaged in transporting contraband persons." The plaintiffs paid or compounded on the original policy as for a total loss, and then brought this action on the reinsurance policy to be indemnified by the defendants.

BIGHAM, J. This is an action brought on a policy of marine insurance effected by the plaintiffs with the defendants, which contained a warranty "no contraband of war." The only question to be determined is whether the defendants have proved a breach of the warranty so as to relieve them from liability.

[The learned judge then stated the facts as above set out, and proceeded as follows:]

The defendants say they are not liable, because there has been a breach of warranty "no contraband of war on basis of cable dated 31 October, 1904;" and the question resolves itself into this: Are contraband persons contraband of war within the meaning of the warranty? I am of opinion that they are not. "Contraband of war" is an expression which in ordinary language is used to describe certain classes of material, and does not cover human beings. Many text-writers on international law have no doubt used the expression "contraband persons," but I think I am right in saying that such words are not to be found in any English case, and certainly not in such connection as to show that they describe a class of contraband of war. The most recent text-writers treat persons as outside any accepted definition of contraband. The transport of

"contraband persons" may no doubt in some cases involve the same consequences to the ship as the carriage of contraband, but so may other acts on the part of the ship, as, for instance, transmitting information to the enemy. It would in my opinion be wrong to say that, because the same results may follow in the one case as in the other, therefore the two cases are identical and may be covered by one definition. The Japanese court carefully avoided describing these officers as contraband of war, and used the somewhat novel, but for their purpose sufficient, expression "contraband persons." The view which I take of this matter is well expressed in the fifth edition of the late Mr. Hall's *Treatise on International Law* at p. 673, where he says:

With the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is however more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connexion with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own sovereign, because the non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individual. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them. When the acts done are of the second kind, the belligerent has no right to look upon them as being otherwise than innocent in intention.

* * * When * * * a neutral in the way of his ordinary business holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he cannot be supposed to identify himself specially with belligerent persons in the service of the state who take passage with him.

A little further on, at p. 682, when examining the terms of the despatches which passed between Great Britain and the United States of America in connection with the *Trent* case, Mr. Hall points out that, whereas Admiralty Courts have power to try claims to contraband goods, they have no power to try claims concerning contraband persons; and he adds:

To say that Admiralty Courts have no means of rendering a judgment in favour of or against persons alleged to be contraband, or of determining what disposition is to be made of them, is to say that persons have not been treated as contraband. If they are contraband the courts must have power to deal with them.

I agree that my interpretation makes it difficult to say to what the warranty would apply, having regard to the fact that the policy already contained a warranty that the cargo should consist of kerosene only; but this difficulty ought not, in my opinion, to induce me to depart from what I am satisfied is the plain meaning of the words, and the sense in which they are always understood among underwriters and merchants.

Judgment for the plaintiffs.

EX PARTE FUDERA

(162 Federal Reporter, 591)

June 24, 1908

WARD, *Circuit Judge*. This is a petition of Vincenzo Fudera, in the custody of the United States marshal for the Southern District of New York, under the application of the Italian Ambassador for the extradition of one Girolamo Asaro on the charge of murder, to be discharged under a writ of habeas corpus. The papers sent forward by the Italian government show that on October 4, 1896, Giuseppe Costa of Castellammare del Golfo was murdered. July 12, 1898, a warrant of arrest was issued in Italy for the apprehension of Girolamo Asaro, "charged with participating in intentional premeditated homicide in that with the intent of killing and with premeditation he, together with others, directed one Buccellato Martino, since dead, to murderously shoot on the night of October 4, 1896, in Bada street (territory of Castellammare), one Giuseppe Costa, thereby killing him instantly." December 3, 1898, Girolamo Asaro was convicted in his absence in contumaciam of having contributed to the murder of Costa by directing one Buccellato Martino to commit the unlawful act, and sentenced to life imprisonment.

Article 1 of the extradition treaty of 1868 between the United States and the Kingdom of Italy (*Act March 23, 1868, 15 Stat. 629*) provides that each party shall deliver up to the other

Persons who, having been convicted of or charged with the crimes specified in the following article [of which murder is one] committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other, provided that this shall be done only upon such evidence of criminality as according to the laws of the place, where the fugitive or person so charged shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed.

One who has been convicted in contumaciam in foreign countries is to be regarded not as convicted of, but only charged with, the offense. *Moore on Extradition, art. 102.*

The petitioner contends that no evidence has been offered, as required by the treaty, which would justify a magistrate of this country in committing Girolamo Asaro for trial if the crime had been committed here. The only testimony on the subject is that of a policeman and of certain Royal Carbineers as to the result of investigations carried on by them in respect to the murder of Costa, expressed in the following language:

We have found that the fugitive, Asaro Girolamo of Mariano, 38 years old, Buccellate Martino of Civanni, 20 years old, and the landowner, Ingaglia Stefano of Giuseppe, 26 years old, all of Castellammare, met a few days before committing the crime, in the store of Ingaglia, which is situated on Busuri street, and then and there decided to rid themselves of Costa Giuseppe, as they considered him friendly to the police force, members of which often met at his house near the mill in Baria street. They drew lots, and it fell to Buccellato Martino to put the decision into effect.

This is the sole evidence of Asaro's connection with the murder committed by Buccellato Martino, and it is pure hearsay, upon which he could not have been committed for trial in this country if the murder had been committed here.

Without considering any other question raised, I think the petitioner is entitled, according to the express provision of the treaty, to be discharged; but to give an opportunity to the demanding government to appeal from this decision, if it be so disposed, an order may be entered providing that he be enlarged upon recognizance with surety for appearance to answer the judgment of the appellate court, provided an appeal be taken within ten days from the entry of the order.

UNITED STATES V. FOO DUCK

(163 Federal Reporter, 440)

July 11, 1908

HUNT, *District Judge*. Appeal from an order of deportation made by the United States Commissioner at Missoula, Mont.

The facts, as agreed upon by the United States attorney and counsel representing the defendant, a Chinaman, are substantially as follows: The father of the defendant is a Chinaman, a merchant, in Missoula, Mont., and has been engaged in the mercantile business in that city for over fifteen years. The defendant is now over twenty-three years old. He arrived in the United States in May, 1901, when he was over sixteen years old. He has a certificate issued under the treaty between the United States and China, and in apparent conformity with section 6 of the act of Congress approved July 5, 1884 (*23 Stat. 116, c. 220 [U. S. Comp. St. 1901, p. 1307]*). In this certificate he gave his former and present occupation as student. After the defendant arrived in Missoula, he worked as a cook and waiter at different times for several years. Part of the time he was helping the matron at the University of Montana, which is situated in Missoula, and while in this position, with the aid of the matron, he studied the English language, and learned to speak and read and write the same. He speaks English quite well, wears short hair, dresses as an American, and has evidently studied considerably.

As no question of fraud is in the case, the point for decision is this: where a minor comes to the United States from China for the purpose of joining his father, who is a merchant lawfully domiciled in the United States, and thereafter, during his minority, such minor labors and studies in the United States, is he entitled to remain in the United States after attaining his majority, or is he liable to deportation? In my opinion such a person is lawfully entitled to remain within the United States. The boy, while a minor, acquired a right of domicile by virtue of his father having such a right; that is, the father's domicile being in this country, as the parent, he had a right to have his minor child enter. *Ex parte Fong Yim, (D. C.) 134 Fed. 938*. This right was independent of any provision for certificate or compliance with other provisions of the law. *U. S. v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544*. The minor really had no occupation when he entered; hence was not within the purview of section 6, relating to those who

must obtain certificates. The reasoning which led to the construction of the statute whereby it was decided that the wife of one who is himself entitled to enter may enter without any certificate is applicable also to the case of a minor child of one so entitled to enter. Both are natural and lawful dependents upon the one who may lawfully have established his domicile in the United States. As the Supreme Court has said:

In the case of the minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes. They come in by reason of their relationship to the father, and, whether they accompany or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate.

U. S. v. Chin Sing, (D. C.) 153 Fed. 590, is remarkably like the case of this appellant. There the defendant entered the United States in 1898, when he was fourteen or fifteen years old, and joined his father, and worked as a helper in his father's store. Upon proceedings had under deportation statutes, Judge Wolverton held that the son had a right to enter without first procuring the certificate, as required by section 6 of the exclusion act, and that having come to the country while a minor, and being the son of a resident Chinese merchant, the defendant was lawfully entitled to remain in the United States. The decision of Judge Wolverton was rendered April 8, 1907, thus showing that the minor, who was fourteen or fifteen years old when he entered the United States in 1898, was twenty-three or twenty-four years of age when the court decided that he was lawfully entitled to remain.

The court, however, is asked whether the case before it is not to be distinguished because of the fact that the appellant worked as a laborer from and after the time he attained his majority. The answer is that: having rightfully entered this country as a minor, and not with intent to become a laborer, he has not forfeited a right to remain by working as a laborer since he was twenty-one. In other words, his coming having been rightful, the fact that, when emancipated, he followed the pursuit of a class of persons who are not entitled to enter, did not operate to deprive him of the right to remain. It is the coming of Chinese laborers into our country that the act is aimed against, and not the expulsion of persons who are here, not having come as laborers, but as children, and

who, perchance, have become laborers in America after they have attained legal age.

My judgment is that the defendant has shown a lawful right to be in the United States, and to remain here, without regard to the certificate held by him.

He will be discharged.

IN RE BUNTARO KUMAGAI

(163 Federal Reporter, 922)

September 3, 1908

HANFORD, *District Judge*. This applicant for naturalization is an educated Japanese gentleman, and, in support of his petition to be admitted to citizenship, he presents a certificate showing that at the expiration of a term for which he enlisted as a soldier in the regular army of the United States he was honorably discharged. There appears to be no objection to his admission to citizenship on personal grounds, and the court has given no consideration to any questions which might be raised of a formal character; the intention of the court being to rest its decision denying the application on the single ground that Congress has not extended to Japanese people not born within the United States the privilege of becoming adopted citizens of this country.

It is the inherent right of every independent nation to determine for itself and according to its own Constitution and laws what persons shall enjoy the rights and privileges of citizenship, and our Constitution declares that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

That is a broad provision, and comprises children of all aliens subject to the jurisdiction of our government without distinction as to race or color; the only exceptions being children of alien parents not subject to the jurisdiction of the United States. *United States v. Wong Kim Ark*, 169 U. S. 665, 18 Sup. Ct. 456, 42 L. Ed. 890. By our Constitution the power to provide for the naturalization of aliens is vested in Congress, the courts have no power to admit aliens to citizenship, otherwise than in accordance with the laws which Congress has enacted, and

aliens can not demand admission to citizenship as a right. They can only claim the privilege of becoming adopted citizens under the provision of laws enacted by Congress. The general policy of our government in regard to the naturalization of aliens has been to limit the privilege of naturalization to white people, the only distinct departure from this general policy being soon after the close of the Civil War, when, in view of the peculiar situation of inhabitants of this country of African descent, the laws were amended so as to permit the naturalization of Africans and aliens of African descent. In the year 1862 (*Act July 17, 1862, c. 200, sec. 21, 12 Stat. 597*) a law was enacted in recognition of services of aliens who enlisted in the military service of this country, authorizing naturalization of aliens who should be honorably discharged from military service and that law became incorporated in title 30 of the Revised Statutes of the United States as section 2166 (*U. S. Comp. St. 1901, p. 1331*). As originally enacted by Congress, section 2169 merely extended the privilege of naturalization to Africans and aliens of African descent, but by the act of 1875, to correct errors and supply omissions in the Revised Statutes, that section was amended to read as follows:

The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.¹

As both sections are comprised in title 30, this amendment of section 2169 provides a rule of construction applicable to section 2166, and, being the latest expression of the will of Congress on the subject, it is controlling, and limits the privilege of naturalization to white persons and those of African nativity or descent. The use of the words "white persons" clearly indicates the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country. *In re Ah Yup, Fed. Cas. No. 104; In re Saito, (C. C.) 62 Fed. 126; In re Yamishita, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860.*

As this applicant is of a different race, the court is constrained to deny his application on the ground that the laws enacted by Congress do not extend to the people of his race the privilege of becoming naturalized citizens of this country.

¹ Act Feb. 18, 1875, c. 80, 18 Stat. 318 (*U. S. Comp. St. 1901, p. 1333*).

FULCO V. SCHUYLKILL STONE CO.

(163 Federal Reporter 124)

July 30, 1908

ARCHIBALD, *District Judge*. The plaintiffs are citizens and residents of Italy and the subjects of its King, and bring suit for damages for the death of their son, who was killed, as they allege, by the negligence of the defendant company by whom he was employed. The accident by which he lost his life occurred in Pennsylvania, and suit is brought on the statutes of that state, giving a right of action to the parents of the deceased in such cases. *Act April 15, 1851, sec. 19 (P. L. 674); Act April 26, 1855, sec. 1 (P. L. 309)*. It is contended by the defendants that the plaintiffs, being nonresident aliens, have no right to sue, and it is upon this that the demurrer proceeds. It was decided by the Supreme Court of Pennsylvania, in *Deni v. Pennsylvania Railroad*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676, and again in *Maiorano v. Baltimore and Ohio R. R.*, 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, that nonresident aliens are not entitled to the benefit of this legislation, not being within its purview, and have no standing in consequence to maintain an action founded upon it. The same construction is put upon similar statutes in other jurisdictions. *Brannigan v. Union Gold Mining Co.*, (C. C.) 93 Fed. Rep. 164; *McMillan v. Spider Lake Co.*, 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947; *Roberts v. Great Northern Railway*, (C. C.) 161 Fed. 239; *Adams v. British Steamship Co.*, 2 Q. B. (1898) 430. Although the weight of the authority is the other way. *Davidsson v. Hill*, 2 K. B. (1901) 606; *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309; *Alfson v. Bush*, 182 N. Y. 396, 75 N. E. 230, 108 Am. St. Rep. 815; *Kelleyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191; *Romano v. Capitol State Brick Co.*, 125 Iowa, 591, 101 N. W. 437, 68 L. R. A. 132, 106 Am. St. Rep. 323; *Railroad v. Naylor*, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. (N. S.) 473, 112 Am. St. Rep. 701; *Renlund v. Commodore Mining Co.*, 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534; *Vetaloro v. Perkins*, (C. C.) 101 Fed. 393; *Hirschkovitz v. Pennsylvania Railroad*, (C. C.) 138 Fed. 439; *Baltimore and Ohio R. R. v. Baldwin*, 144 Fed. 53, 75 C. C. A. 211. But the construction put upon the Pennsylvania statutes, by the courts of that state, is binding here, without regard to how the law may be elsewhere (*Zeiger v. Pennsylvania Railroad*, [C. C.] 151 Fed. 343; *Id.* [C. C. A.] 158 Fed.

809), unless, of course, it is found to be in contravention of the federal law.

It is contended as to this that the plaintiffs are protected by the existing treaty between the United States and Italy of February 26, 1871 (*17 Stat. 845*), which provides:

ARTICLE 3. The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.

ARTICLE 23. The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ in defense of their rights, such advocates, solicitors, notaries, agents, and factors as they judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials.

There was no reference to this treaty in the *Deni* or the *Zeiger* Case; although there was in the *Maiorano*, where it was decided to have no effect; the court holding that, while the treaty may in terms include the entire citizenship of Italy, it obviously is available only to those who either with respect to their persons or property, are within the jurisdiction of the United States. This is a federal question, and the decision of the state court is not controlling; but upon an independent consideration of it, the same conclusion is to be reached.

The rights guaranteed to the citizens of Italy by the one article (3) are constant protection and security for their persons and property, as to which they are to enjoy the same rights and privileges as are or shall be guaranteed to natives. The other article (23) merely preserves the right to resort to the courts to maintain and defend their rights, without other conditions or restrictions than are imposed on natives. But in so guaranteeing protection and security to the persons and property of citizens of Italy, it is manifest that this can only refer to the persons and property of such citizens when within the states and territories of this country. There certainly is no intended guaranty of their persons elsewhere, and neither is there of their property. What property or right of property, then, under the laws of Pennsylvania, do the plaintiffs show which is not accorded them? Certainly they had none in the person or the earnings of their son, for whose death they sue; it not being alleged that he was a minor — if that makes any difference — but merely that

he contributed to their support. The continued expectation of this, no doubt, may measure the loss sustained by the parents by the death of a child, but in no sense is it property, *North Penn Railroad v. Robinson*, 44 Pa. 175, to the contrary, notwithstanding. *Moe v. Smiley*, 125 Pa. 136, 141, 17 Atl. 228, 3 L. R. A. 341. Nor, apart from the statute, did the defendant company owe the plaintiffs any duty to see that their son had a reasonably safe place to work in, the lack of which is the negligence charged, however much they may have owed it to the son himself; this action not being for the enforcement of any obligation to the party killed, which has been transmitted to his parents, through him, but for a distinct cause of their own, if they have any. The whole contention then is brought down to this: that, a right of action being given by the laws of Pennsylvania to its own citizens, under similar circumstances citizens of Italy are entitled to the same, regardless of anything else, because the treaty guarantees the same rights and privileges, as to their persons and property, as are enjoyed by natives. The treaty, in other words, is invoked to raise, or force a right, where none exists without it; but that is not the way it reads. A right existing, it provides that it shall be respected in the same manner and to the same extent in the case of a native of Italy as of a native of this country. It by no means undertakes to put them both in all respects and under all conditions, on an absolute par, to which the doctrine contended for necessarily leads. The state of Pennsylvania, had it so chosen, was at perfect liberty to provide in so many words, in favor of its own citizens only, that in case of death by negligence a right of action should accrue to certain specified relatives, declining to extend it to residents of other countries; but, by the construction put upon the statute by the Supreme Court of the state, that in effect is just what has been done, it being the same as though this proviso was written into it, which the treaty cannot be made to override. It was for the state, in other words, to give or to withhold the right, as well as to define the extent of it and the parties who were to be benefited, and, having withheld it in such a case as we have here, that is the end of the matter.

There are authorities, no doubt, which hold otherwise as to the effect of such a treaty (*Railroad v. Naylor*, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. [N. S.] 473, 112 Am. St. Rep. 701; *Bahaud v. Bize* [C. C.] 105 Fed. 485; and possibly *New Orleans v. Abbagnato*, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329). But not, as it seems to me, with reason.

Judgment is therefore directed to be entered on the demurrer in favor of the defendants, with costs.

DECISIONS CONCERNING EXPULSION OF FOREIGNERS FROM BRAZIL ¹*Résumé*

Le droit d'expulser un étranger est un attribut essentiel de la souveraineté, un droit préexistant à l'admission de l'étranger sur le sol de la nation et dont l'exercice est une condition toujours présumée de cette admission; l'article 72 de la constitution du Brésil assurant à l'étranger, durant sa résidence, au Brésil les mêmes garanties qu'au national n'a pas pour effet d'empêcher la nation d'expulser celui qui trouble l'ordre et la tranquillité publics.

L'expulsion n'a pas le caractère d'une peine proprement dite; elle est une mesure de police administrative rentrant, comme telle, dans les attributions du pouvoir exécutif. Et lorsqu'il a été fait régulièrement notification à l'étranger d'une décision du ministre de la Justice "lui prescrivant de quitter le territoire national, parce que son séjour dans la capitale compromet la tranquillité publique," un tel ordre d'expulsion est suffisamment motivé aux termes des articles 1 et 8 de la loi du 7 janv. 1907,² et, par suite, doit recevoir son exécution.

Mais le tribunal suprême fédéral et les tribunaux fédéraux de section n'en demeurent pas moins compétents pour connaître des demandes d'*habeas corpus* formées contre les ordonnances d'expulsion.

Le pouvoir judiciaire peut donc ordonner l'*habeas corpus* quand l'ordre d'expulsion n'a pas été régulièrement notifié et suffisamment motivé ou quand l'étranger ne se trouve pas dans les conditions voulues par la loi du 7 janv. 1907 — si, par exemple, il habite au Brésil depuis plus de deux ans.

Décision du tribunal suprême fédéral, le 30 janvier, 1907

Le citoyen français, Albert Benamow a demandé une ordonnance d'*habeas corpus*. Il a exposé et fait valoir qu'il avait été arrêté par ordre du ministre de la Justice pour être expulsé du territoire, aux termes de l'article 1 de la loi n°. 1641 du 7 janv. 1907; que la Constitution garantit aux étrangers résidant dans le pays, comme droits inviolables, la liberté et la sécurité individuelles, de sorte que les étrangers ne peuvent être expulsés du territoire de la République; qu'il résidait dans la capitale depuis de longues années; que l'expulsion est une véritable peine, échappant par suite à la compétence du pouvoir exécutif; qu'il n'avait pas été donné au plaignant notification officielle de son expulsion, notification nécessaire pour l'exercice du recours prévu par l'article 89 de cette loi; que pour les raisons ci-dessus la contrainte qu'il avait subie

¹ Quoted from reports by P. Sumien, P. Goulé and Al. Martin, printed in *Revue de droit international privé et de droit pénal international*, 1908, Nos. 4-5, p. 821.

The notes comparing French and Brazilian law are also from that *Revue*.

² See Supplement, 1:410.

dans sa liberté était illégale; — Cons. qu'il appartient au Tribunal suprême de rendre l'ordonnance d'*habeas corpus*, quand la contrainte procède de l'autorité dont les actes sont soumis à sa juridiction (L. n. 221 de 1894, art. 23). — Cons. que dans ces conditions rentrent les ministres d'État, qui, pour les crimes de droit commun et entraînant leur responsabilité, sont poursuivis et jugés exclusivement par ce Tribunal; — Cons. que le droit d'expulser un étranger est un attribut essentiel de la souveraineté, un droit préexistant à l'admission de l'étranger sur le sol de la nation et dont l'exercice est une condition toujours présumée de cette admission; qu'il suffit seulement qu'il n'ait pas été dans les intentions du législateur de la Constitution d'interdire l'usage de ce droit aux pouvoirs souverains de la nation; — Cons. que la Constitution en assurant à l'étranger résidant dans le pays l'inviolabilité de la liberté et de la sécurité individuelles, a voulu seulement déclarer que l'étranger *durant sa résidence au Brésil* aurait les mêmes garanties que le national, ce qui évidemment n'a pas pour effet de priver la nation du droit de l'expulser de son sein, quand il porte atteinte à l'ordre et à la tranquillité publics; — Cons. que cette interprétation n'est pas contredite par l'article 72 de la Constitution, parce que, si le gouvernement ne peut empêcher l'étranger de pénétrer sur le territoire national, tant que dure sa situation de résidant, rien n'empêche qu'il soit privé de cette situation; qu'en outre l'étranger n'a pas *droit à la résidence* dans le pays, ce droit étant réservé aux nationaux; — Cons. que les garanties définies dans l'article 72 de la Constitution ne peuvent, comme on le prétend, être entendues littéralement et en termes absolus; toutes étant plus ou moins sujettes à des restrictions, imposées par les convenances de bien général, par l'ordre public, par l'hygiène, etc.; — Cons. que la jurisprudence affirmée par ce tribunal dans de nombreux jugements admet que les garanties promises par la Constitution à l'étranger résidant au Brésil n'excluent pas le droit d'expulsion; mesure d'ordre public universellement adoptée comme un élément d'assainissement moral, de conservation et de défense (Jugements, n°. 322 du 6 juin 1892; n°. 388 du 21 juin 1893; n°. 617 du 22 sept. 1894; n°. 758 du 13 mars 1895; n°. 1106 du 3 août 1898; n°. 979 du 11 oct. 1905) — Cons. que la loi n°. 1641 du 7 janv. 1907, réglant le droit l'expulsion et en limitant l'exercice, prohibe dans son art. 3 la déportation d'un étranger résidant sur le territoire de la République pendant deux années continues ou même pendant moins de temps, s'il est marié avec une Brésilienne ou veuf avec un fils brésilien; cons. que le plaignant ne justifie pas qu'il se trouve dans l'un des cas prévus par

cet article; — Cons. que l'expulsion d'un étranger n'a pas le caractère d'une peine proprement dite, que c'est une mesure de police administrative, rentrant virtuellement comme telle dans les attributions du pouvoir exécutif; — Cons. qu'il a été fait notification au plaignant de la décision ordonnant son expulsion, qui est déclarée: "rendue en vertu d'un ordre du ministre de la Justice du 23 janvier, lui prescrivant de quitter le territoire national, son séjour dans la capitale compromettant la tranquillité publique (art. 1 de la loi n°. 1641)," justifiant que la décision contient les motifs d'expulsion nécessaires pour l'exercice du recours administratif prévu par l'article 8 de la loi, et est valable par suite de l'avis officiel mentionné dans l'art. 3; — Cons. que, par ces motifs, le plaignant n'a pas subi de contrainte illégale dans sa liberté. — Décidons de refuser l'ordonnance demandée et condamnons le plaignant aux frais.

Décision du tribunal fédéral de deuxième instance, le 11 février 1907

Le Tribunal, Vu la demande d'*habeas corpus* présentée au nom d'Augusta Roth, autrichienne, expulsée du territoire brésilien sur l'ordre du ministre de la Justice. — Cons. que le reproche d'inconstitutionnalité soulevé contre la loi n°. 1641 du 7 janv. 1907 a contre lui la jurisprudence du Tribunal suprême affirmant, que l'expulsion des étrangers dans des circonstances déterminées n'est pas en opposition avec l'article 72 de la Constitution (décisions n°. 322 du 6 juin 1892, 338 du 21 juin 1893, 758 du 13 mars 1895 et 116 du 3 août 1898); * * * — Cons. que, soit que l'on admette, avec les premières de ces décisions, que l'exercice de cette faculté est indépendant de toute autorisation légale, soit que l'on admette, avec les dernières, que cette faculté est subordonnée à l'existence d'une loi qui l'autorise et la régleme, il est manifeste que la loi du 7 janvier restreint le pouvoir arbitraire de l'autorité administrative, en prescrivant les cas dans lesquels peut avoir lieu l'expulsion, d'un étranger et les conditions auxquelles elle doit être effectuée; — Cons. que, par suite, le pouvoir exécutif est soumis dans l'exercice de cette attribution, aux limitations et règles fixées par le législateur et qu'en les enfreignant il porte atteinte aux droits qu'elles consacrent et garantissent; — Cons. qu'il appartient au pouvoir judiciaire fédéral, ayant pour organes le tribunal suprême et les tribunaux de sections (const. art. 35, décr. n°. 848, art. et 3), de protéger les droits individuels menacés ou lésés contre les violations de la Constitution ou des lois fédérales; — Cons. qu'il est indifférent que cette violation émane d'un particulier ou d'un acte de la puissance publique indifférent aussi, que cet acte s'inspire

de motifs d'ordre privé ou de raisons d'ordre politique, et qu'il suffit pour motiver l'intervention des tribunaux qu'elle soit sollicitée par la partie intéressée et que dans l'espèce il soit justifié de l'atteinte à un droit individuel; — Cons. que conférer ou reconnaître au pouvoir exécutif compétence pour décider de l'opportunité ou de l'inopportunité de l'expulsion d'un étranger (comme en matière d'*extradition*) n'a pas pour effet d'écarter ou de méconnaître la compétence des tribunaux pour juger de l'illégalité de l'acte, de la procédure, de la réalité ou de la fausseté des motifs déterminants de l'expulsion; — Cons. qu'il est inadmissible (telle est du moins l'opinion des auteurs et la pratique suivie dans tous les pays) qu'une semblable mesure soit pratiquée en dehors des raisons d'ordre et de sécurité rappelées dans l'article 1^{er} de la loi du 7 janv., et que le législateur et la Constitution aient entendu remettre cette matière à la discrétion du pouvoir exécutif, en excluant toute intervention des tribunaux; qu'il est clair que le droit d'expulsion est contenu et limité dans l'autorisation donnée par cet article, auquel il n'y a pas lieu d'opposer les dispositions des articles suivants; — Cons. que l'institution d'un recours ordinaire dans l'article 8 de ladite loi, limité au cas de preuve de la fausseté des motifs de l'expulsion, n'a nullement pour effet de restreindre le recours extraordinaire de l'*habeas corpus*, que la Constitution assure aux nationaux et aux étrangers *toutes les fois* qu'ils subissent ou sont menacés de subir une contrainte par suite d'illégalité ou d'abus de pouvoir (Const., art. 72, sec. 22); — Cons. que le système contraire aboutit à cette conclusion que le pouvoir exécutif est investi du droit exorbitant d'expulser du territoire national des étrangers paisibles, des étrangers résidant au Brésil depuis plus de deux ans, et même jusqu'à des nationaux, et qu'il lui suffit, pour enlever le recours de l'*habeas corpus* (seul efficace dans l'espèce) et empêcher l'intervention du pouvoir judiciaire, d'alléguer que son acte est motivé par l'article 1^{er}; — Cons. que le haut tribunal suprême fédéral, dans sa dernière session, instruisant et jugeant un recours d'*habeas corpus* présenté par un étranger expulsé en vertu de l'article 1^{er}, a consacré la doctrine admettant la recevabilité de ce recours;³ — Cons. que dans l'expulsion de la demanderesse on a violé les dispositions de l'article 7, en ne lui faisant pas une notification officielle, avec les motifs déterminants de la décision, comme la loi le prescrit; — Cons. que l'avis défectueux et incomplet remis à la demanderesse déclare qu'elle *a été expulsée aux termes* de l'article 1^{er} du décret du 7 janv. 1907, tandis que le ministère de la Justice déclare "qu'elle est

³ V. la décision précédente, p. 496.

expulsée en vertu de l'article 2 du même décret, comme exerçant le proxénétisme;" — Cons. que cette divergence entre deux documents également officiels aggrave l'illégalité de l'acte, en constituant un obstacle empêchant la plaignante d'user du recours ordinaire de l'article 8; — Cons. en outre que la plaignante établit, par des documents produits devant le juge fédéral de 1^{re} instance, qu'elle réside dans le pays depuis plus de deux ans et que, par suite, elle doit bénéficier de l'exception mentionnée dans l'article 3 de ladite loi; — Cons. que la mesure prise contre la plaignante est illégale, que l'acte de gouvernement soit fondé sur l'article 2 comme l'indique l'avis ministériel, ou sur l'article 1^{er} invoqué dans la décision — que l'*habeas corpus* est, dans l'espèce, le seul remède légal — jugeons le recours recevable et faisons droit à la demande.

OBSERVATIONS. L'expulsion des étrangers est régie au Brésil par une loi récente du 7 janv. 1907, dont les deux jugements ci-dessus rapportés font application.

Le droit d'expulsion, qui appartient au ministre de la Justice, est à la fois limité et réglementé par cette loi.

Limité: Le jugement du Tribunal fédéral du 30 janv. 1907, nous indique, en effet, qu'il y a des étrangers qui ne peuvent point être expulsés; le jugement du tribunal fédéral de deuxième instance du 11 févr. 1907, nous montre que les cas d'expulsion sont nettement délimités et classés en deux catégories distinctes.

Réglementé: Des deux jugements il résulte, en effet, que la mesure d'expulsion doit être exactement motivée, et qu'elle peut être l'objet d'un recours, selon les cas, soit devant les tribunaux auxquels la loi donne mission d'examiner le bien ou mal fondé des motifs allégués, soit auprès de l'autorité qui l'a prononcée.

Il en est tout autrement en France, de par la loi du 3 déc. 1849, qui est, paraît-il, à la veille d'être profondément modifiée. C'est une raison de plus pour analyser, avec les jugements ci-dessus, la nouvelle loi brésilienne, rapportée d'ailleurs, avec les instructions ministérielles qui l'ont suivie.⁴

I

La loi du 7 janv. 1907 dispose d'abord que: "l'étranger qui, pour un motif quelconque compromet la sécurité nationale ou la tranquillité publique peut être expulsé * * * du territoire national" (art. 1^{er}); et que "sont également des motifs suffisants d'expulsion: (1) une condamnation ou une poursuite devant les tribunaux étrangers pour crime ou délit de droit commun; (2) deux condamnations au moins devant les tribunaux brésiliens pour crimes ou délits de droit commun; (3) le vagabondage, la mendicité ou le proxénétisme dûment établis" (art. 2). Quant à l'article 3 de la loi, il édicte que "l'étranger ne peut être expulsé, s'il réside sur le territoire de la République depuis deux années continues, ou même depuis moins longtemps, s'il est marié avec une Brésilienne, ou veuf avec un enfant brésilien." C'est d'ailleurs, parce que le "plaignant," dans notre première espèce, n'a point justifié qu'il se trouvait dans un des cas

⁴ V. Supplement, 1:412.

prévus par ce dernier article, qu'il a vu l'arrêté pris à son encontre maintenu; c'est, au contraire, entre autres raisons, parce qu'elle a justifié qu'elle résidait dans le pays depuis plus de deux ans, que la requérante de la deuxième espèce a pu échapper à la mesure prise contre elle.

En France, au contraire, les motifs qui peuvent occasionner l'expulsion ne sont nullement délimités, et aucun étranger n'en est à l'abri.

L'étranger est passible d'expulsion, dès que sa présence sur notre territoire constitue un danger, et pareille mesure peut être prononcée sans que l'on ait à se préoccuper du point de savoir s'il s'y trouve de passage, ou s'il y a une résidence déjà longue, s'il y est fixé à perpétuelle demeure, et même s'il est autorisé à domicile. En ce cas, cependant "la mesure cesse *de plano* de produire son effet," si l'autorisation n'a pas été révoquée par décision du Gouvernement. L'article 7 de la loi du 3 déc. 1849 porte, en effet: "Le ministre de l'Intérieur pourra, par mesure de police, enjoindre à *tout étranger*, voyageant ou résidant en France, de sortir immédiatement du territoire français et le faire conduire à la frontière. * * * Le ministre aura le même droit à l'égard de l'étranger qui aura obtenu l'autorisation d'établir son domicile en France; mais, après un délai de deux mois, la mesure cessera d'avoir effet, si l'autorisation n'a pas été révoquée. * * * "Aussi certains jurisconsultes s'élèvent-ils contre un pouvoir qu'ils trouvent démesuré, et souhaitent-ils que, tout en conservant à l'État la faculté de repousser de son territoire les étrangers dangereux ou gênants, on réglemente l'exercice de cette faculté.⁵ On peut noter, d'ailleurs, que certains États, notamment la Belgique et les Pays-Bas, avant le Brésil, ont adopté en notre matière, des dispositions dont la loi du 7 janv. 1907 paraît s'être inspirée. La loi belge du 12 févr. 1897⁶ porte que "l'étranger résidant qui par sa conduite compromet la tranquillité publique, ou celui qui est poursuivi ou qui a été condamné à l'étranger pour les crimes ou délits qui donnent lieu à l'extradition, peut être contraint par le Gouvernement de sortir du Royaume (art. 1er); mais aux termes de l'article 2: ne peuvent être expulsés, pourvu que la nation à laquelle ils appartiennent soit en paix avec la Belgique: (a) l'étranger autorisé à établir son domicile dans le Royaume, (b) l'étranger marié à une femme belge dont il a un ou plusieurs enfants nés en Belgique pendant sa résidence dans le pays, (c) l'étranger, marié à une femme belge résidant en Belgique depuis plus de cinq ans et continuant à y résider d'une manière permanente. * * * " D'après la loi néerlandaise également, "ne peut être expulsé l'étranger qui, établi dans le pays, a épousé une Néerlandaise et a eu plusieurs enfants nés dans le royaume."⁷

Nous n'en estimons pas moins qu'il est, d'une part, impossible, et pour le moins inutile, de vouloir de la sorte énumérer les causes d'expulsion, et, d'autre part, qu'il est dangereux d'en affranchir certaines catégories d'étrangers.

Tout d'abord, il paraît impossible de déterminer de façon précise les cas dans lesquels l'expulsion doit pouvoir être appliquée. "Elle est affaire de circonstances; il convient de laisser l'autorité compétente seule appréciatrice des

⁵ V. not., Weiss, *Tr. de dr. int. pr.*, 2^e éd., t. 2, p. 92.

⁶ V. *Ann. de lég. étrang.*, t. 27, année 1898, p. 514.

⁷ V. Jitta, *Le dr. d'expuls. des étrang. dans la législ. des Pays-Bas* (*J. dr. int. pr.*, 1902, p. 69).

nécessités qui peuvent la déterminer.”⁸ En tout cas, si l'on pense que les motifs d'expulsion peuvent être nettement déterminés, il faut bien reconnaître que ces motifs seront toujours assez nombreux pour laisser en somme au gouvernement une entière liberté de décision.⁹ Déclarer, en les énumérant, que sont des motifs suffisants d'expulsion: une condamnation ou la poursuite devant des tribunaux étrangers pour crimes ou délits de droit commun deux condamnations au moins devant les tribunaux brésiliens pour pareils crimes ou délits — le vagabondage, la mendicité, et le proxénétisme; — alors qu'on a déjà décidé que l'étranger qui compromet la sécurité nationale ou la tranquillité publique peut être chassé, n'est-ce pas, en effet, autoriser l'autorité compétente à prononcer l'expulsion sur une vaste échelle, à ses risques et périls? Autant, dès lors, ne pas faire une énumération qui est un trompe-l'œil, selon la saisissante expression de notre regretté rédacteur en chef. Le ministre de la Justice du Brésil peut, en effet, expulser ceux qui troublent la sécurité nationale ou la tranquillité publique, ceux qui ont été condamnés ou poursuivis, les vagabonds, les mendiants et les proxénètes; il n'a rien à envier à notre ministre de l'Intérieur. — Remarquons, d'ailleurs, que le projet déposé le 4 mars 1882, sur le bureau de la Chambre des députés par MM. Goblet et Humbert, et, qui a précisément pour but de régler le droit d'expulsion, n'a tenté aucune énumération de causes légitimes.

Quant à affranchir certaines catégories d'étrangers de la mesure qui nous occupe, nous croyons qu'il y a là un danger véritable. Pourquoi, à priori, mettre à l'abri de cette mesure des individus qui, au demeurant, sont restés étrangers? Assurément, celui qui s'est marié avec une Brésilienne a fait montre de quelque attachement envers le Brésil; mais est-ce une raison pour lui donner du coup l'assurance que, quoi qu'il advienne, le Brésil ne pourra point se séparer de lui? — Pourquoi traiter, d'ailleurs, avec plus de mansuétude les veufs avec des enfants? — Est-ce que deux années de résidence continue peuvent suffire à enraciner profondément sur le sol d'un pays?

Le projet de MM. Goblet et Humbert n'a affranchi aucun étranger de la menace d'expulsion; mais, il a cependant assimilé l'étranger résidant en France depuis plus de trois ans à l'étranger admis à domicile. Comme ce dernier, il pourrait être expulsé; mais pour tous deux, la mesure cesserait d'avoir effet, après un délai de deux mois, si elle n'a pas été confirmée par décision du gouvernement, après avis du Conseil d'État. — Même ainsi réduite, nous ne croyons pas que la faveur faite aux étrangers résidents doive être approuvée.¹⁰ — Pourquoi mettre de la sorte sur le pied d'égalité l'étranger résidant et l'étranger autorisé à domicile? Dire qu'il mérite autant d'intérêt, étant donné que le plus souvent il n'a pas demandé l'admission à domicile, parce qu'il ignorait cette procédure, ou reculait devant la formalité de l'enquête administrative¹¹ est justifier de façon assez singulière l'intérêt que l'on réclame pour lui!

⁸ V. Piédelièvre, *précis de dr. int. publ.*, t. 1, n°. 210, p. 182. *Adde*, Lainé, *De l'expulsion des étrangers appelés à devenir français par le bienfait de la loi* (*J. dr. int. pr.*, 1897, p. 710).

⁹ V. en ce sens, Piédelièvre, *loc. cit.*

¹⁰ V. cep., Weiss, *op. cit.*, t. 2, p. 93, *in fine*-94.

¹¹ V. not., Legrand, rapport (*J. off.*, Chambre des députés, Doc. parl., avr. 1882, p. 946).

II

Des jugements ci-dessus, il résulte, en outre, que l'arrêté prononçant l'expulsion doit contenir les motifs à raison desquels il est pris — et qu'il peut être déféré soit à l'autorité de qui il émane, soit aux tribunaux eux-mêmes. L'article 7 de la loi du 7 janv. 1907 dispose, en effet: "Le pouvoir exécutif fera notifier dans une note officielle à l'étranger qu'il décide d'expulser, les motifs de sa décision. * * *" Et, de par l'art. 8: " * * * l'étranger pourra exercer un recours devant le pouvoir même qui a ordonné son expulsion, si elle est fondée sur la disposition de l'art. 1^{er}, ou devant le pouvoir judiciaire fédéral, s'il est procédé en vertu des dispositions de l'art. 2. Dans ce dernier cas seulement, le recours aura un effet suspensif." — En d'autres termes, de deux choses l'une: (a) l'étranger a été expulsé, à raison d'une condamnation prononcée par un tribunal étranger, ou de deux condamnations prononcées par un tribunal brésilien, ou à raison de sa qualité de vagabond ou de proxénète, il peut s'adresser directement à la justice et y établir qu'il n'a encouru aucune condamnation, qu'il n'est ni un vagabond, ni un proxénète; le tribunal est compétent pour "connaître de la réalité ou de la fausseté des motifs." Le jugement du tribunal fédéral de deuxième instance du 11 fevr. 1907 (2^e espèce ci-dessus), le dit en propres termes; — (b) l'étranger a été expulsé parce qu'il compromettrait la tranquillité publique, il peut recourir au ministre lui-même, et prouver qu'à aucun moment il n'a constitué un danger, qu'il n'a jamais violé la loi de l'hospitalité. Même en ce cas, d'ailleurs, — c'est ce qu'il importe de bien remarquer — l'étranger peut encore s'adresser à la justice, et obtenir une ordonnance d'*habeas corpus*. Le Tribunal fédéral puise, en effet, dans son pouvoir de juger les crimes et délits de droit commun des ministres d'État, le droit de contrôler leurs actes et de déclarer qu'ils ont exercé "une contrainte illégale sur la liberté individuelle." L'autorité judiciaire annulera alors l'ordre d'expulsion notamment, si l'individu qui en est l'objet n'est point passible d'une telle mesure, s'il est Brésilien ou domicilié au Brésil depuis deux ans, si la décision prise n'a pas été notifiée à l'intéressé avec ces motifs, enfin si l'ordre est *irrégulier*: le gouvernement, en appliquant fausement l'article 1^{er} à un vagabond ou à un proxénète, ne saurait, en effet, le priver du recours judiciaire institué par l'article 8. Notre deuxième espèce le dit expressément. Un jugement de 22 janv. 1907 du tribunal fédéral, aff. *De Freitas* (*J. dr. int. pr.* 1907, p. 1166) le proclame également.

Chez nous, au contraire, aucune disposition n'impose au ministre de l'Intérieur de motiver ses arrêtés; et, la loi du 3 déc. 1849 n'ouvre aux intéressés aucune voie de recours devant nos tribunaux. La jurisprudence ¹² et la doctrine ¹³ sont

¹² V. not., Cons. d'État, 4 août 1836, *Naundorff* (S. 1836. 2. 445); 8 déc. 1853, *Dame de Solms* (S. 1854. 2. 409); 22 janv. 1867, *Radziwill* (*Rec. des arrêts du Conseil d'État*, p. 94); Cass. 3 août 1874 et 8 fevr. 1876 (S. 1876. 1. 193); Paris, 29 Janv. 1876 (S. 1876. 2. 297); Trib. de la Seine, 10 août 1878 (*J. dr. int. pr.*, 1878, p. 495); Cons. d'État, 14 mars 1884, *Morphy* (S. 1886. 3. 2.); 26 déc. 1902, *Rapi* (cette *Revue*, 1905, p. 529; S. et P. 1906. 3. 96). Comp. Cons. d'État, 14 mars 1890, *Ribes* (S. et P. 1892. 3. 85), et la note sous cet arrêt.

¹³ V. not., Weiss, *op. cit.*, t. 2, p. 92, note 2; Féraud-Giraud, *De la réglementation de l'expuls. des étrang.* (*J. dr. int. pr.*, 1890, p. 424); Arthur Desjardins

d'accord pour déclarer que le bien ou mal fondé de la mesure d'expulsion ne peut être débattu ou querellé devant une juridiction, que, seule *l'Administration est juge des motifs* qui, d'après elle, l'ont rendue nécessaire. — L'autorité judiciaire n'a compétence que pour connaître de la *légalité* de l'arrêté, c'est-à-dire, pour examiner si la mesure atteint vraiment un étranger. Si l'individu expulsé, poursuivi devant le tribunal correctionnel conformément à l'article 8 de la loi du 3 déc. 1849, pour infraction à l'arrêté, prétend qu'il est Français, le tribunal non seulement peut, mais encore doit, contrôler les dires de l'inculpé, et au cas où il les reconnaît exacts, déclarer la mesure illégalement prise.¹⁴ Mais, en aucun cas, les motifs de l'expulsion ne sont envisagés, son mérite n'est mis en cause.

Nous comprenons que la loi brésilienne exige que les motifs soient nettement indiqués — et, nous souhaiterions même que nos arrêtés fussent moins laconiques;¹⁵ mais il nous paraît inadmissible, d'une manière générale, que des tribunaux puissent, dans une mesure quelconque, être juges des motifs qui ont nécessité une expulsion, ces motifs se rattachant souvent à des questions qui intéressent la tranquillité et l'ordre publics, la sécurité nationale. Comment apprécieront-ils, en effet, en pleine connaissance de cause la mesure intervenue? On ne pourra pas cependant leur apporter les rapports confidentiels des préfets, "leur révéler certains périls intérieurs, peut-être même extérieurs, les faire participer à la direction politique des affaires." * * *¹⁶ Et, puis, si l'expulsion n'est pas une peine, mais une mesure de surêté générale, de police administrative, comme le disent les jugements ci-dessus, et ainsi que chacun le pense,¹⁷ pourquoi les tribunaux en connaîtraient-ils? Par sa nature, l'expulsion doit échapper à l'appréciation de l'autorité judiciaire. Lorsqu'une expulsion arbitraire, non fondée, intervient, ce n'est pas aux tribunaux que l'on doit s'adresser; il suffit de demander aide et protection à son consul, de provoquer l'intervention de l'envoyé diplomatique du pays auquel on appartient.¹⁸ Il suffira à lui seul pour faire rapporter un arrêté injustement pris.

D'ailleurs les expulsions arbitraires ne sont point tant à redouter! A part

(*Ques. soc. et polit.*, p. 107); Bès de Berc, *De l'expuls. des étrang.*, p. 33, 64 et s.; Darut, *Id.*, p. 202 et s.

¹⁴ V. en ce sens, Paris, 11 juin 1883 (S. 1883. 2. 117); Cass., 7 déc. 1883 (S. 1885. 1. 89); Paris, 6 févr. 1884 (S. 1885. 2. 215); Alger, 2 déc. 1886 (*Rev. algér.*, 1886, p. 449); Cass., 28 mai 1903 (*J. dr. int. pr.*, 1904, p. 689). *Adde*, Weiss, *op. cit.*, t. 2, p. 92, note 2; Féraud-Giraud, *loc. cit.*, p. 425; Bès de Berc, *op. cit.*, p. 66 et s.; Darut, *loc. cit.* Comp. Cons. d'État, 14 mars 1890, Ribos, précité, et la note sous cet arrêt.

¹⁵ V. la formule-type de nos arrêtés dans Brayer, *Procéd. adm. des bureaux de police*, p. 325-326, et dans Darut, *op. cit.*, p. 161, note.

¹⁶ V. Arthur Desjardins, *op. cit.*, p. 107, *in fine*-108. *Adde*, en ce sens, Bès de Berc, *op. cit.*, p. 65.

¹⁷ V. not., Weiss, *op. cit.*, t. 2, p. 88, *in fine*, 91; Bonfils et Fauchille, *Man. de dr. int. publ.*, 5^e éd., n. 1055; Lainé, *loc. cit.*; Ducrocq, *Cours de dr. adm.*, 7^e éd., t. 3, n. 1134-1135; Garraud, *Tr. de dr. pén.*, 2^e éd., t. 1, n. 178, p. 333; Arthur Desjardins, *loc. cit.*, p. 107; Bès de Berc, *op. cit.*, p. 64; Darut, *op. cit.*, p. 25 et s.

¹⁸ V. en ce sens, Pradier-Fodéré (*J. dr. int. pr.*, 1878, p. 590).

quelques cas, que l'on n'oublie pas de rappeler avec une certaine complaisance,¹⁹ où l'Administration s'est montrée d'une sévérité excessive, on ne peut lui reprocher de conduire aux frontières des étrangers pour le seul plaisir de les chasser de la France. Comme nous le disions naguère, dans cette *Revue* même, "dans la réalité des cas, les étrangers que l'on expulse l'ont presque toujours mérité par une conduite immorale, par des idées subversives, même par des délits, en un mot par le danger qui s'attache à leur présence sur notre sol."²⁰

Un État, au surplus, ne peut point s'abuser du droit d'expulsion; l'abus susciterait fatalement des rancunes, appellerait des actes de rétorsion et entraînerait des difficultés internationales.²¹ Puis, il faut tenir compte du contrôle que les Chambres exercent sur le Gouvernement. La Chambre des députés notamment l'exerce de façon efficace; toutes les expulsions importantes ont donné lieu devant elle à des débats passionnés dont le Gouvernement est toujours sorti triomphant. — La plupart des législations enfin, ainsi que le remarque, en le déplorant, il est vrai, M. P. Fiore,²² ne connaissent pas de voies de recours judiciaire en matière d'expulsion.

Au résumé, la loi brésilienne du 7 janv. 1907 peut être excellente au Brésil, où l'immigration doit être favorisée; mais nous ne croyons pas qu'il soit à souhaiter que le Gouvernement français la prenne pour modèle ou même s'en inspire dans son prochain projet.

Une dernière observation. — Les deux jugements ci-dessus déclarent que la loi du 7 janv. 1907 n'est pas inconstitutionnelle, et que, par suite, elle doit recevoir application. Au Brésil, en effet, les tribunaux ont le droit de tenir pour non avenues les lois contraires à la Constitution. On alléguait, dans les deux espèces qui ont donné lieu à nos jugements, que la loi du 7 janv. 1907 était contraire à l'article 72 de la Constitution, d'après lequel: "Les étrangers jouissent, à titre égal des Brésiliens, de l'inviolabilité des droits de liberté, de sécurité individuelle et de propriété." A cette prétention, le tribunal suprême fédéral répond énergiquement "que les garanties définies dans l'article 72 ne peuvent être entendues littéralement et en terms absolus, toutes étant plus ou moins sujettes à des restrictions imposées par les convenances du bien général, par l'ordre public; * * * que, dès lors, les garanties promises par la Constitution à l'étranger résidant au Brésil n'excluent pas le droit d'expulsion, mesure d'ordre public universellement adoptée comme un élément d'assainissement moral, de conservation et défense." Cela était utile à souligner, en terminant, alors surtout que le tribunal fédéral avait jugé, le 22 janv. 1907, à propos de l'affaire *De Freitas*, précitée, que la loi du 7 janv. 1907 portait au moins atteinte à la Constitution, en permettant d'expulser un étranger à raison de condamnations ou de poursuites encourues dans son pays d'origine.

AL. MARTINI.

¹⁹ V. not., R. Hubert, *Et. prat. de l'expuls. des étrang.* (*Gaz. des Trib.* du 1^{er} oct. 1897); Darut, *op. cit.*, p. 158 et s.

²⁰ V. note sous diverses décisions relatives à l'expulsion des étrangers appelés à devenir français par le bienfait de la loi (*R. de dr. int. pr.*, 1908, p. 656 et s.).

²¹ V. en ce sens, not., Piédelièvre, *op. cit.*, t. 1, n. 210, p. 182.

²² V. P. Fiore, *Nouv. dr. int. publ.*, 2^e éd. (trad. Antoine), t. 1, n. 699.

BOOK REVIEWS

Letters of Mrs. James G. Blaine. Edited by Harriet S. Blaine Beale.
New York: Duffield & Co. 1908.

This publication will be a disappointment to the public man who examines it with a view to finding new light upon the career of one of the most conspicuous actors in the history of the American people during the last half of the nineteenth century. Mrs. Blaine was known to be in active sympathy with her distinguished husband in his political contests and services, and the natural expectation would be to find in a compilation of her letters many references to these matters. But an examination of the two volumes shows that they contain very few letters to either Mr. Blaine or to his intimate political friends, and that they are made up almost exclusively of letters from Mrs. Blaine to her children and to them when they were in their school-days.

The compilation was evidently a labor of love and filial devotion, and the object of its publication seems to have been, not as a contribution to political history, but to show Mrs. Blaine in her true character as a loving wife and mother through her family relations and her social life. For this purpose the work has been very well done, and to the letters some valuable notes of historic interest have been added by the editor for the enlightenment of the reader.

Notwithstanding the somewhat limited scope of the work, it contains a number of interesting references to political and diplomatic affairs, worthy of notice in a review for the JOURNAL. In a letter to her son Walker written in 1879, after the national presidential convention of 1876 and just before that of 1880, in both of which Mr. Blaine was a prominent candidate for the nomination, we get a glimpse of Mrs. Blaine's view of political life, when she writes: "Your father is so occupied [with the Maine election] that after he emerges from his chamber in the morning, I do not require or receive so much civility as a word from him, and sometimes I am so deeply disgusted with American politics, our whole system of popular government, with its fever, its passion, its excitement, disappointment, and bitter reaction, that any sphere, however humble, which gives a man to his family, seems to me better than the prize of high place."

But the next year, after Garfield had been elected president, she wrote to her daughter, "Oh! how good it is to win and be on the strong side." And two years later, in the midst of the ever-recurring Maine contest which robbed the family of the attentions of the head of the house, she consoles herself by saying: "After all there is something very pleasant in a Maine election to me."

During the four successive presidential campaigns, 1876, 1880, 1884, and 1888, when Mr. Blaine was a prominent figure, his aspirations for the high office must have been the topic uppermost in the family, yet in Mrs. Blaine's letters we find only occasional references to them and for the greater part of those periods few or no letters appear. Enough, however, is published to indicate the state of feeling in the home circle. On the eve of the convention of 1880 she wrote her daughter M., a schoolgirl at Farmington: "I do not know what to say about the week of the convention and coming home. * * * I am almost sure a combination will be made against your Father, and then I would rather you were in Farmington. * * * I have lately thought he would get it, but now I am very doubtful. His rivals are desperate."

Two years after the failure in the convention of 1880, in writing again to the same daughter, she reported "Ben. Harrison" as taking part in the Maine campaign, and adds he "is very likely to be the next presidential Republican nominee — did I hear you sigh?" About the same time she wrote Mr. Blaine, who was on a stumping tour in the West, that she saw he was reported as taking part in a conference at which Harrison was present: "I am sure you did not, but I venture to say *don't*. All I ask of you is to stay dumb." Although the nomination came to him in 1884, the campaign is largely passed over in silence. But three weeks after its fateful close, we have this letter to one of her daughters, giving a vivid picture of the scene as the election returns were received at the Augusta home:

"You need not feel envious of any one who was here during those trying days. It is all a horror to me. I was absolutely certain of the election, as I had a right to be from Mr. ——'s assertions. Then the fluctuations were so trying to the nerves. It is easy to bear now, but the click-click of the telegraph, the shouting through the telephone in response to its never-to-be-satisfied demand, and the unceasing murmur of men's voices, coming up through the night to my room, will never go out of my memory — while over and above all, the perspiration and chills, into which the conflicting reports constantly threw the physical

part of one, body and soul alike rebelling against the restraints of nature, made an experience not to be voluntarily recalled."

But it seems Mrs. Blaine did recall four years later one of the most untoward incidents of that disastrous campaign. On November 3, 1888, she sent from New York a letter to "Dear Jamie," the youngest son, then at school, giving a description of the grand Republican parade on the eve of the election, and referred to having witnessed a similar parade in honor of his father in 1884, which was preceded in the afternoon by the address of Dr. Burchard, whose alliteration of "rum, Romanism, and rebellion" is credited with having suddenly turned victory into defeat. Sadly she says: "It recalls that awful Saturday afternoon four years ago, but O, the difference to me!"

The presidential aspirations of Mr. Blaine, as revealed in the Letters, may be dismissed with one more extract. In 1887 Mr. Blaine and a portion of the family went to Europe on account of his health. As the time for a presidential convention again approached, his friends and adherents were anxious to know his intentions or desires respecting another nomination. Mrs. Blaine, in a letter from Florence, Italy, to her youngest daughter, the editor of these Letters, gives his decision: "Breakfast just over — 9.30 — your Father in good spirits reading over his letter of declination, which goes in a day or two to Mr. Jones, chairman of the Republican National Committee. Do not cry, it has to go, and we shall all be happier for being spared a summer of suspense with the chances of defeat in the autumn. You know what Savonarola said when he had been tortured into confession, 'A man without virtue may be a Pope, but such a work as I contemplated demanded a man of excellent virtues.' Apply this to Pater and the Presidency."

The first reference to diplomatic matters in the Letters is found in Mrs. Blaine's account given to her son Walker of the visit of the Iwakura mission from Japan in 1872. She speaks of the punctilious ceremonies arranged by the Secretary of State, Mr. Fish, of the various consultations with her of Mr. and Mrs. Fish respecting them; and the prominent part assigned her because of her position as wife of the Speaker of the House. In describing the ceremonies at the Executive Mansion, she made this generous allusion to the wife of the President: "I was quite unprepared for the womanliness, cordiality, and thoroughly unaffected kindness of Mrs. Grant's reception of these semi-heathen. I could not have done half so well."

During the critical period of 1872, when the Geneva arbitration of the

"Alabama" claims was in danger of failure, because of the British protest against the American national and indirect claims, it appears that Mr. Blaine took a deep interest in maintaining the attitude of our government, and held a lengthy interview with Secretary Fish urging that no embarrassing concession be made to the British attitude.

The first entrance of Mr. Blaine on direct diplomatic duties was as secretary of state under President Garfield in March, 1881, and from the beginning they proved very welcome to him, as within two weeks after he entered upon this work we find Mrs. Blaine writing to her daughter in Paris, "the Secretaryship grows more and more agreeable." But it was to prove of short duration, as the bullet of Guiteau laid low his chief, and the new president desired another head to the department of state. It is apparent from the Letters that Mr. Blaine earnestly desired to remain in the office, and that the supercession was a great disappointment to the family. Only a few days before President Arthur sent the nomination of Mr. Frelinghuysen to the Senate, Mrs. Blaine wrote to her daughter: "Congress is in session, so we are daily expecting your Father's head to roll into the basket. I cannot but feel a little blue, though the person chiefly interested was never gayer or in better health."

Although his incumbency of the department only covered nine months, it marked a period of great activity. Among other measures, he issued his circular dispatch to the American ministers in Europe, informing the Great Powers of the purpose of the United States to make the Isthmian Canal an American enterprise; he assumed the position that the Clayton-Bulwer treaty was obsolete and no longer binding on us; he dispatched his commission of plenipotentiaries to South America to mediate in the war between Chili and Peru; and he took steps to call a conference of the American States. With the coming of a new secretary most of those measures were halted or reversed, but Mr. Blaine lived to see some of them realized in later years.

No part of Mr. Blaine's political career is more fully elucidated in the Letters than this period. Immediately after the change in the department it was given out that the change was necessitated by his interference with the war in South America, and Mrs. Blaine wrote to her daughter: "Do not feel uneasy about anything you may hear politically. The Chili and Peru business need not give you the slightest concern. It is a decided policy instead of drifting, as cowardly Americans desire to do. Your Father has asserted the rights of his country as was his bounden

duty." Two weeks later she writes to the same daughter (then in Paris) as follows: "Your Father's policy, which is decidedly American, you will see much criticised, and you must remember that this is greatly to his credit. A policy which European countries would applaud, could not be very American."

A little later when the Chili-Peru correspondence had been made public, she wrote again: "I hasten to say, let not your heart be troubled, neither let it be afraid. Only on the publication of those state papers yesterday morning did your Father know that his instructions had been altered and revoked. * * * Your Pater has decided on the patient dignity of perfect silence. But he says he never wrote papers of which a man or his children ought to be more proud, and there is not a single word in them he would have changed. * * * Undoubtedly the State Department intended the life of your Father. They revoked his instructions, though they were Arthur's as well; they kept back his papers, they sent to Congress garbled dispatches of Trescott's, they permitted private letters of Christiancy to be sent to Congress. * * * Your Father will be vindicated in every particular. His policy is a patriotic one, and the people are so going to recognize it. Not a selfish thought in it, but it is in all its ramifications American." And some weeks later she adds: "Serene in the consciousness of a policy or policies which looked out for the interests of America, and which time is as sure to justify as it is to come, he may well wait undisturbed, while Mr. Frelinghuysen accounts to his master, the people, for his truckling subserviency."

Whatever may be the judgment of history on these policies of Mr. Blaine, there is no question that his enforced retirement from public life at that time was in two respects a great gain to his country and of lasting benefit to his fame. It enabled him to devote undivided attention to the preparation of his oration on the death of Garfield, delivered at the request of Congress in the Hall of the House of Representatives, which will take a high rank among the classic eulogies of great men. This was followed by his "Twenty Years of Congress," written during the two years after his retirement from the department.

In the same month of his retirement Mrs. Blaine wrote to her daughter M.: "School is out, but the boy is not at play. On the contrary, his leisure is as oppressive to him as Rollo's on his holiday, and were it not for the Garfield eulogy, which makes a goal for his reveries, I should think him a little blue." We have a delicate revelation of Mr. Blaine's tenderness of heart which could only be made in the familiarity of this

family correspondence. Mrs. Blaine, in giving her daughter an account of the preparation of the eulogy, writes that she sits by the hour quietly in the room while he works, for he enforces silence, and she says: "For the second time this morning, I see him taking from the drawer a fresh pocket handkerchief, with which he vainly tries to hide his tears, and this time, wholly overcome, he has beaten a retreat to the blue room."

The ordinary hero-worshipper who fancies that his ideal hero, endowed with great genius, is able to dash off an oration without premeditation, may learn a lesson from these Letters. Although Mr. Blaine was one of the most versatile of the public men of his time, very ready of speech, and an orator of eminence, we get an insight into the manner of occupation of the two months' undivided time he gave to the Garfield Eulogy, in Mrs. Blaine's account to her daughter: "No better proof of the imminence of the 27th [the date fixed for its delivery] could be given, than the immense pile of books, while waiting transportation to the State Library. In fact your Father is at this moment, for the eleventh time, going over the manuscript, smoothing out all inequalities of language, for he persisted in the first place in writing in the most careless manner, insisting always, when I remonstrated on the awful after labor that he way laying up for himself — 'Let me get down the ideas, and the language will come of itself.' But, alas, he often finds it frozen truth, only to be warmed into motion by infinite nursing and pains."

We find that two years after he left the department of state he was still engaged upon his *Twenty Years of Congress*, but his work does not appear to have attracted so much the attention and interest of the family. Of this Mrs. Blaine says: "Your Father is writing a book, his *Twenty Years in Congress*. It will not probably be interesting to you, and to me, but think of the many, many, who will want to read and to own it."

This literary work was doubtless interesting and afforded a temporary outlet to his restless energy, but it did not satisfy the ambition which impelled him to other occupation. Writing six months after his retirement, Mrs. Blaine says: "You must not imagine he suffers from one regret for public life, quite the contrary, you could not at present drive him back. The love will revive, I doubt not, but now he is bound to try other paths." The other path which first opened was the presidential campaign and defeat of 1884, but from the time he held the seat at the head of the Garfield cabinet, he specially longed to return to the management of diplomatic affairs. In the same month in which he was forced

to give up that post Mrs. Blaine wrote her daughter: "I have had a long talk with him, finding him very cheery. * * * He says there is only one position he craves in the future, the Presidency may go, but he would like to carry out his views of statecraft in 1885 as Secretary of State." Two years later she writes again: "The one thing he perhaps does desire is to be once more Secretary of State." And other expressions of a similar character appear in the correspondence.

The opportunity so much desired came when President-elect Harrison invited him to become secretary of state. The confidence which Mrs. Blaine reposed in her children is shown in her letter to "Dear Jamie," then a schoolboy, imparting the confidential communication of Mr. Harrison, "in his own handwriting, full of cordial words and good understanding," and she adds, "no doubt your Father will accept this trust, and gladly." Two days after he entered on the duties of the department she wrote: "It is all delightful, delightful to see your Father occupied with urgent business worthy of his high powers." And to Mr. Manly on the same day: "Mr. Blaine enjoys his occupation thoroughly. I have not seen him look so well, so gay, for a long, long while."

It is charming to note the high estimate of his intellectual ability which prevailed in Mr. Blaine's family and the freedom with which it is mentioned in the Letters. In writing to her daughter M. of the Clayton-Bulwer treaty discussion which followed his departure from the department, she exclaims at the end, "I would give more for what lies within the frosty paw of my John Anderson than all the brains of all the others." And again: "All the diplomats evidently regard the late Secretary of State as the one formidable American." Just as he was about to reenter the cabinet of President Harrison, she writes: "I thrill when I think of the part which your Father may play in the future of this country."

Notwithstanding the high hopes with which the family hailed Mr. Blaine's return to the management of diplomatic affairs, these expectations were only to be realized in part. The first dark cloud appearing above the horizon is indicated by Mrs. Blaine, ten days after official duties had been resumed, when she writes to the editor of the work under review, then at the Farmington school, giving an account of the presentation of the diplomatic corps to the President: "It is all interesting, though Harrison is of such a nature that you do not feel at liberty to enjoy yourself. For instance, he objected to Jacky [Walker B.] as First Assistant Secretary of State. Your Father did not care to make a fight

about it, so he quietly put him in as law-adviser. * * * All propositions are rejected. It is a most uncomfortable twist in the make-up of a man."

The other trouble which obstructed the unalloyed enjoyment and success of the head of the Department, is indicated in Mrs. Blaine's letter written within two months after taking the post. "Congratulate me and the principal sufferer, that the embargo of the lumbago is removed and that your Father is actually out again."

It is known that gradually the relations between the Executive Mansion and the residence of the premier of the cabinet became quite strained; and that attacks of severe illness often incapacitated him from the discharge of his duties. But here, so far as revealed in this work, the curtain drops upon the political life of the great Secretary.

JOHN W. FOSTER.

Halleck's International Law. Fourth edition, thoroughly revised and in many parts rewritten by Sir G. Sherston Baker, Bart., assisted by Maurice N. Drucquer. 2 vols. London: Kegan Paul, Trench, Trübner and Co. 1908.

General Halleck's original work was especially valued because of its fullness of treatment of the laws of war and of the experience of the author in that direction. For thirty years Sir Sherston Baker has borne the relation of an editor to this work, correcting what was in his judgment obsolete or mistaken, at first by notes, but in the later editions by changes of text. As to the character of these changes the curiosity of the reader is somewhat aroused by the unusual tone of the preface. Writing of the Conventions framed by the Second Hague Conference he says:

Whether all or any of these conventions will ever be accepted by any powers, even by an inferior power, remains to be seen. The Second Conference met with great pomp and circumstance, but has achieved nothing. * * * No general or admiral worth the name would pause in difficult strategy, or at the moment of victory, because some effeminate article of the Second Hague Convention or other grandmotherly conference, forbade him to do so and so.

And the author felicitates himself that his work is "not one of theory but eminently one of practice" and used by all British ships of war.

Let us see. Of the fifteen conventions of this "grandmotherly" Second Hague Conference, the delegates of Great Britain signed (with reservation in five cases) all but one. Many of these have entered the rules of war. They are as binding upon their signatories as any other international

agreement. The breach of them means bad faith; it may mean also damages. Yet our author assures us that his dictum of the existing law drawn from precedent, is what a British officer will follow, rather than an international agreement. He is one of that class, now happily growing small, which would make a hide-bound non-progressive science of the law of nations, failing to see that it grows and is actually in process of piecemeal codification, by the best means possible — treaty stipulation.

It is the new matter in this fourth edition, not General Halleck's work, but Sir Sherston's work, which is under review. Halleck's first chapter is a brief history of International Law by periods. To this the present edition has added an eleventh section, from the Civil War of 1861 to the present time, noting the principal events, the important questions and the names of writers on the law of nations. As illustrative of the author's sense of proportion, no mention is here made of Morocco and the Algeciras conference, the Congo question since 1888, the Second Hague Conference, amongst important questions, while there is included, "The decision of the Queens Bench Division in the 'Mignonette' case in 1884, that the old law of the sea permitting cannibalism in extremest necessity is wrong," a judgment which Sir Sherston takes pains to combat.

The American publicists who have caught his eye in this period are D. D. Field, R. H. Dana, President W. A. P. Martin, Wharton, Cushman Davis and Hannis Taylor. Of J. B. Moore, Professor Wilson, Professor Snow, J. B. Scott, Professor Hershey and others he says nothing; nor of any Japanese writers though Takahashi has written in English and Ariga in French. Kleen is not given from Scandinavia, but Aubert, Goos and Olincrona. W. E. Hall is not mentioned amongst English publicists, yet his authority is second to that of no other writer in English.

Five-sixths of volume one relate to international law in time of peace. There are a hundred pages more than in the first edition, yet it is hard to see that the additions and changes have been of uniform value or the old text as "thoroughly revised" as the title asserts under date of 1908. Here are a few of the errors or omissions noted:

I: p. 151. A commodore "who is the highest officer in the United States navy."

I: p. 176. Our fishery treaty of 1818 with Great Britain is not stated to be perpetual in terms, which was its unusual and distinctive feature.

I: p. 177. The Fur Seal Arbitration is referred to, but the decision of the court as to jurisdiction over seals at sea, and as to property right in seals at sea, the point at issue, is not given. One is left in the dark as to the result of the arbitration.

I: p. 190. Amongst the rivers whose navigation has been made free, the Congo

is not mentioned. The Italian theory that allegiance is the best test of civil status, which has been widely followed, is not alluded to.

I: p. 195. Reference is made to the alliance between the South African Republics and the Orange Free State which anticipated the Boer war, although the former "was said by Great Britain to be a semi-sovereign state under British suzerainty." In point of fact the treaty veto power upon which the claim to suzerainty was founded, expressly excluded these two states from its operation.

I: p. 177. The decision in the 'headland' question, which declared the big bays like Fundy to be a part of the high seas (Mr. Bates, referee in the case of the *Washington*) does not appear in the discussion of this subject.

I: p. 501. The Dogger Bank inquiry is stated to have been made by "this permanent court at The Hague," which is manifestly an error, having been made by a specially constituted committee of admirals.

Certain features of the old edition are retained, *e. g.*, the very full statement as to naval salutes and etiquette, and the valuable description of consular courts in the east and of the mixed courts in Egypt. On the other hand a convenient list of treaties for the abolition of the slave trade which was in the first edition, is now omitted. The marginal topic notes on each page are a good addition. There is an immense mass of references to authors, but they are mostly antiquated. Thus Hall is cited only once in volume I and not at all in volume II.

In his treatment of the relations of states in time of war, the editor is even more disappointing. Our war with Spain, England's war with the Boers, Japan's war with Russia, particularly, furnished many *causes célèbres* which have since been the subject of plentiful discussion and of international legislation. The references to these in the new edition are few and brief and perfunctory. Moreover it is a serious reproach to a work dated 1908, that it incorporates none of the rules of war agreed to at The Hague in 1907 and early in 1908. Surely they were worth waiting for, had that been necessary. The printing of the text of the convention respecting the laws and usages of war on land at the end of a chapter (but none of the other conventions relating to war) does not relieve the editor of this reproach. Even the 1899 Hague Conventions are largely disregarded. In speaking of them (II:18) he writes:

How far the spirit of these conventions will be maintained in time of war is very uncertain. * * * The ferocity of war in actual practice will not suffer itself to be tied by hard and fast rules. We fear that these conventions are more likely to be honoured in the breach than in the observance.

The experience of the Russo-Japanese war, if the editor had cared to study it might have reassured him. To assume without proof, that a

treaty is going to be violated and therefore to think ill of its provisions, is hardly a scientific spirit. This neglect of something which for some unexplained reason is distasteful leads to errors in treatment of important subjects which are vital. Thus (I: p. 160) the restriction of the legalized *levée en masse* to non occupied territory, is not mentioned. The abuse of floating mines in the *Gulf of Pe chi li* is properly characterized (I: p. 620) but the convention of 1907 to regulate the practice is not noticed.

The Hague, 1899, prohibition of the use of an enemy's uniform is not noted. The editor seems (II: p. 82) to have an entire misconception of the 1899 Hague rule as to bombardment which prohibited it in *undefended* places only. This discussion of privateering stops with our Civil War. The discussion of contraband (II: p. 264) *ancipitis usus* leaves out the *Knight Commander* case, although that is referred to, later (p. 310) with the mistaken assertion that Russia paid damages for its sinking. The treatment of the doctrine of continuous voyages (II:339) is inadequate with a bare reference to the Boer War cases and no reference to its approval by the Institute. One of the noteworthy changes in the text (I:630) is dictated by the desire to cast discredit upon the execution of Major André. A lengthy note (II: p. 18) gives the correspondence between von Moltke and Bluntschli as to the rules of the Oxford (1880) Manual, in order to illustrate the military attitude. This is interesting but appears to confuse the provisions of a treaty with a code drawn up by a mere committee of a learned society. Does the editor mean to imply that a German general would violate the 1899 convention in case of war!

It would be easy to multiply instances of inadequate treatment, of national prejudice, of personal bias. The truth is that the promise of the title page is not fulfilled. The "thorough revision" is illusory.

THEODORE S. WOOLSEY.

Die staatsbürgerliche Sonderstellung des deutschen Militärstandes. By Erich Schwenger. J. C. B. Mohr: Tübingen. 1907. pp. viii, 129.

The author makes the assertion that his monograph is the first to deal, in systematic fashion, with the particular rights and obligations involved in the German military status. To accomplish this purpose, he has minutely digested about twenty imperial statutes bearing in any manner upon the subject and has arranged their contents, with his own commentary, under the proper headings.

The introduction seeks to define the class-term "military persons" within the meaning of the statutes and shows that the term embraces

those in the naval service as well as in the army. Nor is the status limited to those in active service but embraces also retired officers under pension (p. 12).

Throughout the German Empire, military persons occupy a peculiar position both in respect of political as well as civil rights. As to the former, the book shows the extent to which the German state has gone in protecting itself against military domination. The intention of the statutes appears to be the complete disenfranchisement of all persons belonging to the active service. This refers, however, only to the "active electoral right" of voting at political elections and not to the "passive electoral right" or representing the people in the legislatures of the states, or of the Empire. It is interesting to note, however, that since the formation of the German state, Count Moltke has been the only active military person to serve as representative of the people in the Reichstag (p. 22).

A large portion of the book is devoted to a consideration of the peculiarities of the military status in respect of private right. Under this head, the deviations from the normal status appear to be more numerous and extensive in the German Empire than in most modern states.

An imperial statute enacts a restriction upon the capacity to marry in that the consent of the division commander is essential. This is additional to requisites which the particular state demands in the case of military persons (p. 35). An inhibition which differs in legal character from the foregoing is that which prevents military persons of the active service from engaging in any business or trade without the consent of their superior officers. This does not effect a limitation of capacity, as the sanction of the law rests on penalty alone (p. 38).

An interesting section is devoted to special rules applicable to the execution of soldiers' wills, from which it appears that the German law of recent time has repealed the old exception of the Roman law sustaining verbal testaments "*in procinctu*" except when reduced to writing in the presence of superior military officers and read over to the testator (p. 47).

The special position occupied by military persons in respect of punishment for crime tends to exempt them from the jurisdiction of the ordinary civil tribunals. The author defines the jurisdiction of the various courts martial provided by the statutes and outlines in brief their organization and procedure (p. 90).

The final part of the book deals with the status of military persons in respect of public law. Under this head the author considers the variation of the obligation to pay the different taxes and imposts levied in the city, state and nation and the right to receive maintenance from the state in the way of pensions or otherwise (pp. 101-129).

The book is written in a clear style and treats an involved subject in a commendably systematic manner. Though some of the details seem of trifling importance, the very minuteness of the statutes in defining the privileges and obligations appertaining to the military status serves, in itself, to give a clearer insight into the result reached in the organization of the modern type of the military state.

ARTHUR K. KUHN.

Die Schiffsgewalt des Kapitäns und ihre geschichtlichen Grundlagen.

By Dr. Otto Weber. J. C. B. Mohr: Tübingen. 1907. pp. viii, 81.

The master of a merchant ship is subject to obligations and is invested with powers which cannot be ascribed merely to the express or implied will of the owners of the ship, or of the cargo. It is true that certain of his powers to deal with the ship and cargo and part of his authority over the crew and passengers may be sustained upon the ordinary principles of commercial law, but the author insists that many of the acts of the master may be justified only upon the basis of a direct investiture with part of the authority of the state.

It is this extraordinary power which the author seeks to analyze in the light of history and to define in detail in accordance with German law. The origin of the master's powers is ascribed to the early customary practice of seamen which long antedated the earliest writings concerning maritime usages (p. 34). The author seeks to describe the variations in the powers of the master during the period of state organization, according to the respective laws of the states and maritime municipalities. The period of variance continued to the beginning of the nineteenth century. From that time a period of greater uniformity set in, due to the increase of maritime intercourse.

The modern tendency is in the direction of an extension of the master's powers, at least in Germany. The author cites the *Seemannsordnung* of 1902 as the most recent revision of German maritime law. In this, the master is given the long sought title of "Captain," by way of final recognition of a shipboard hierarchy (p. 64).

The author sees in this enactment a confirmation on the part of the legislative organs of the German state, of certain theories in respect of maritime commerce which he himself approves. The principal proposition for which the author contends is that "ship authority" represents throughout its whole extent but another form of "state authority." The former is the means by which the latter reaches out beyond the territorial boundaries of the state to the most remote parts of the world. for the purpose of protecting the rights and supervising the interests of the subjects of the state. Thus "ship authority" represents "state authority" on the high seas as "consular authority" represents it in foreign territory. For this reason the organs of the state should extend rather than limit the authority of the master and should make him specifically, as he now is in effect, by the operation of the numerous paragraphs distributed throughout the body of the written law, the supreme authority on board ship, with the rights and duties of an administrative officer (p. 32).

The wise regulation of the master's powers is, in the opinion of the author, not a matter of merely national concern but it is also one of international obligation. The duty of the state to maintain an orderly intercourse between itself and other nations by means of ships flying its flag can only be completely fulfilled by delegating to some person the authority to act on board ship in the name and subject to the orders of the government. During the voyage and especially during sojourns in foreign ports there is the possibility of conflict with the state authority of a foreign nation. For the actions of these aboard ship the foreign state will hold the home state responsible and the home state may meet this responsibility fully only by a corresponding control over ship authority through wise provisions of its public maritime law (p. 63).

The author does not say that such a claim has ever been made and, in fact, it is extremely doubtful whether it is recognizable in international law. The book is remarkably barren of actual cases or illustrative examples and demonstrates the inadequacy of accepting the written law as the sole guide and applying to it metaphysical argument.

In the historical portion of the book (pp. 34-61) the author has of course laid particular stress on the development of the law in Germany. He has also, however, briefly sketched the legislation of other nations as well. He seems to approve the provisions of our own "Harbor Act" whereby the master is prohibited from covenanting any limitation of responsibility for loss or damage from negligence, fault, or failure in

loading, stowage, custody, care, or proper delivery of property committed to his care. The author sees in this a corresponding extension of the immediate control of the master over the goods and hence in line with his main argument.

As is well known, the act is fundamentally different from the law of his own country, where the freedom of contract has not been limited, but there is discernible a tendency to legislate there and elsewhere along similar lines (see Report of Proceedings of International Law Association, Christiania Meeting, 1905, p. 183).

ARTHUR K. KUHN.

Modern Constitutions. By Walter Fairleigh Dodd. Chicago: University of Chicago Press. 1909. 2 vols. pp. 351, 334. Price, \$5.42, pp.

"A collection of the fundamental laws of twenty-two of the most important countries of the world," has just appeared, edited with historical and bibliographical notes by Mr. Walter F. Dodd. Important in constitutional law as are the various documents here printed in translated form with the historical and critical notes necessary to their understanding, they are nevertheless important in international law, because the conduct of foreign affairs depends in no small measure upon the internal and constitutional machinery, and in many cases the rights assured and guaranteed to the foreigner are measured by the constitution and administered in accordance with its provisions by courts of justice or appropriate organs. A foreign nation may be presumed to contract with full knowledge of the constitutional provisions of the state with which it enters into relations, but as international law stops at the threshold and international organization can not well be considered by the foreign country, the importance of a correct and thorough understanding of the constitution and laws of any nation is fundamental because it enables treaties and conventions and informal agreements to be drawn in such a form as to secure their execution without raising embarrassing constitutional questions.

Mr. Dodd prints the constitutions of the following states: **Argentina, Austria-Hungary, Belgium, Brazil, Chile, Denmark, France, Germany, Italy, Japan, Mexico, Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland, United States.** In addition he includes the Constitutional Act of the Commonwealth of Australia, the British North American Act of 1867, and the subsequent legislation which federated

Canada. The student is thus enabled to study not merely the constitutions of independent political unities, recognized as the persons of international law, but to trace the gradual and necessary steps by which self-governing communities assume constitutional and it may be international standing. In the same way the Austrian and the Hungarian constitutions, as well as the Austria-Hungarian law concerning internal and international affairs are set forth.

To each constitution Mr. Dodd prefixes a brief but adequate historical introduction, and follows it with a select bibliography of the leading works dealing with the constitutional law of each of the countries represented. Mr. Dodd has examined personally the literature and where he has been unable to examine the works cited he indicates, as in the case of Mexico (p. 39), that they "have not been examined by the editor but they are referred to in high terms" by competent authority. Where necessary to a correct understanding of the text Mr. Dodd has added a note and furnished cross-references.

An index at the end of the second volume places the contents of the work at the disposal of the reader and student, and even a casual examination of the index shows the importance of the work to the student of international law. It is to be hoped that the success of the work will encourage Mr. Dodd to prepare companion volumes including the constitutions of the countries not represented in the present collection.

JAMES BROWN SCOTT.

Effects of War on Property. By Almá Latifi, M. A., LL. D. With a note on belligerent rights at sea by John Westlake, K. C., LL. D., D. C. L. London: Macmillan and Co. 1909. pp. 152. \$1.50 net.

The present volume, consisting of 143 pages with a note on belligerent rights at sea by Westlake (pages 145-153), is a careful and thoughtful examination of the effects of war on property whether it be real, personal, mixed; whether it belong to the enemy or be neutral; whether it be situated upon land or upon the high seas. The view-point of the author is that of Anglo-American jurisprudence. He rejects the theory announced by Rousseau, applied by Portalis, and supported by an array of recent authority, that war is solely a relation between states, preferring the older doctrine that enemy character of the subjects is determined by the action of the state.

Mr. Latifi likewise rejects the theory of nationality which is advanced by the continent as the test of enemy character and prefers the time-

honored and carefully developed doctrine of American and English courts of justice that enemy character is determined by domicile. Mr. Latifi also repudiates the immunity sought to be extended to private property of the enemy upon the high seas, and in pages 116-143 gives many and weighty reasons why the doctrine promulgated by Abbé de Mably in his *Droit public de l'Europe, fondé sur les traités* (1748), approved by Saliani in his treatise on the *Duties of Neutrals* (1782), and championed by the United States, should not be accepted. In this view Professor Westlake concurs.

Mr. Latifi's subject is a very broad one, involving as it does, the complex effects of war upon property, but complicated and difficult as it is, the work is handled clearly, carefully, in the light of principle and authority, adjudged cases are very frequently quoted, and there are numerous references to the works of authority. Mr. Latifi's volume is therefore to be commended to the profession.

JAMES BROWN SCOTT.

Pacific Blockade. By Albert E. Hogan, LL. D., B. A. Oxford: Clarendon Press. 1908. pp. 183.

Mr. Hogan's monograph on pacific blockade is a very welcome contribution to a recent subject bristling with difficulties, which, although frequently applied by nations to their inferiors and recognized as legitimate by their superiors, cannot be said to have met the criticism of critics in such a way as to become an institute of international law. And yet it is difficult not to recognize the doctrine of pacific blockade. If nations have the right to compel the settlement of controversies by a resort to war, they most assuredly possess the right to force adjustment by less drastic measures on the simple theory that the greater includes the lesser right.

It is always within the province of the blockaded state to refuse to recognize the pacific nature of the proposed blockade, and to treat its institution as an act of war, whereupon the blockade becomes legitimate and extends not merely to the blockaded port but to neutral nations. Thus viewed the question is one between the two countries. A very serious difficulty arises when the pacific blockade is extended to neutral nations, for it may well be that neutral nations are willing to recognize the blockade as an act of war but withhold recognition from it as a pacific instrumentality. It is true that war imposes restrictions upon neutrals,

but at the same time it recognizes neutral rights and duties placed upon the belligerent. Whether or not a neutral nation accepts the legitimacy of a pacific blockade would seem to be a matter of policy as well as of international law.

Mr. Hogan examines very carefully (pages 11-72) the theory and practice of pacific blockade from its inception in 1827 to the Venezuela blockade of 1902-3. In the second part of his monograph (pages 73-157) he gives an admirable historical account of the various blockades, and in an appendix (pages 159-183) he collects the various notices of pacific blockade issued by the blockading powers. On pages 70-72 he sets forth his conclusions on the entire subject, which, as they are the result of a careful, painstaking examination, deserve quotation:

1. Any state or states may blockade the coasts and ports of another state in time of peace to coerce the latter into acting in accordance with the wishes of the blockading state or states.¹ If the state whose coasts or ports are blockaded is not prepared to regard the blockade as an act of war, the blockade is termed pacific.

2. It is usual to warn the state to be blockaded of the impending blockade.

3. If vessels flying the flag of any state other than those blockading or blockaded are to be interfered with in any way, notice of the blockade must be given to the state whose flag they fly. It is also usual to give a separate warning to each particular vessel before any action, other than that of turning such vessels away, is taken with regard to them.

In such cases, vessels flying the flag of any state other than those blockading or blockaded, which are in the port blockaded at the time of the institution of the blockade, must be given a reasonable time to leave such port without interference from the blockading squadron.

4. The blockading state may treat vessels flying its own flag in any way it thinks best.

5. It is desirable that the blockade should be effective.

6. The blockade need not be universal, but may be confined to some particular commodity or commodities, or to the vessels of the state blockaded.

7. As a general rule all vessels flying the flag of the state blockaded, which have been seized during the blockade, must be handed back on the raising of the blockade; but —

(a) Where the demands made on the state blockaded, being of a pecuniary character, have not been satisfied, such vessels may be retained to satisfy them.

(b) Where any damage has been done to such vessels there can be no claim against the state or states blockading to make good such damage.

¹ Mr. Hogan notes: "This must now be read subject to the provisions of the 'Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts,' which embodies the 'Drago' doctrine, and was agreed to at the second Hague Conference, 1907." See Supplement, 2:81.

(c) In exceptional cases, where the blockade is directed against some practice, such as slavery, which is contrary to international morality, any vessels seized which are engaged in such practice may be condemned.

8. Vessels flying the flag of any state other than those blockading or blockaded may not be interfered with except —

(a) In cases where the blockade has been instituted by the Concert of Europe.

(b) With the consent of the state whose flag they fly, such consent to be implied in the absence of any protest from such state.

9. Where, under the exceptions to the last preceding rule, interference with vessels flying the flag of a state other than those blockading or blockaded is permissible, such interference must not go beyond the detention of such vessels during the existence of the blockade.

An elaborate bibliography (pages 7-10) precedes the treatise and although there is no index, the table of contents and the conclusions above quoted render an index unnecessary. It is to be hoped that Mr. Hogan's examination of a limited field of international law will encourage the preparation of monographs dealing with various phases of international law so that teacher and student may no longer be forced to foreign literature or to consult general and therefore inadequate treatment of various doctrines as given in text books aiming to cover the entire field of international law.

JAMES BROWN SCOTT.

La Segunda Conferencia Internacional de la Paz. By Dr. Fernando Sanchez de Fuentes. Habana: Imprenta Avisador Comercial. 1908. pp. 38.

The author of this pamphlet was the secretary of the Cuban Delegation to the Second Hague Conference. The pamphlet is a reprint of an article published in the "Revista de la Facultad de letras y ciencias," and is practically a clear, unbiased statement of the actual happenings at The Hague, reported as it is presumed the secretaries of all the delegations reported the daily events to their respective governments. It is a colorless diary of the plenary sessions, followed by a sketch of the work of each of the commissions, and the various subcommissions. As a brief, straightforward sketch of the work, which one can easily understand, and from which one may, without the labor of perusing the three weighty volumes of *procès verbaux*, secure a bird's-eye view of the Conference, the pamphlet is to be recommended.

Bibliographie du Droit International. By Le Marquis de Olivart, Associate Member of the Institute of International Law. Third volume. Paris: A. Pedone. 1908.

We have already noted (2:250) the appearance of the first two volumes of this work, and the third has now come from the press. It covers the period from December 1, 1906, to August 20, 1908, and follows the plan of the preceding fascicules, adding to the already seemingly exhaustive list of books, monographs, magazine articles, etc., which they contained. A fourth and final volume was, according to a note in the third, promised before the end of 1908, but it has not reached us as yet.

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